In the Matter of:

WILLIAM MARCUS,
Complainant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Date Issued: December 15, 1998

Case Nos.: 1996-CAA-03
1996-CAA-07

Stephen M. Kohn, Esquire,
David K. Colapinto, Esquire,
For Complainant

Joanne M. Hogan, Esquire,
Melissa Marquez, Esquire,
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These proceedings arise under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 ("CAA"); the Safe Drinking Water Act, 42 U.S.C. § 300j-9 ("SDWA"); the Solid Waste Disposal Act, 42 U.S.C. § 6971 ("SWDA"); the Water Pollution Control Act, 33 U.S.C. § 1367 ("WPCA"); the "Superfund" law, 42 U.S.C. § 9610 ("CERCLA"); and the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"); implementing regulations appear at 29 C.F.R. Part 24.[1] Such provisions protect employees against discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

[1]Collectively these statutes will be referenced as "the environmental statutes" or "the Six Acts." Another name for the Solid Waste Disposal Act is the Resource Recovery and Control Act, another name for "Superfund" is the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and another name for the Water Pollution Control Act ("WPCA") is the Clean Water Act ("CWA").

A hearing in these consolidated cases was held on the following dates: May 6-8, 1996; July 22-26, 1996; August 12-13 and 15, 1996; September 4-6, 1996; and November 13, 1996. The parties were represented by counsel and were given an opportunity to present evidence and arguments. On September 9, 1997, the final post hearing submissions from the parties were received.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND / HEARING RECORD

Complainant William L. Marcus ("Complainant"), through counsel, filed a complaint with the Wage and Hour Division in Washington, D.C., on October 14, 1995, alleging discrimination in violation of the environmental statutes. These allegations included both retaliation for bringing a prior whistleblower complaint against the Environmental Protection Agency ("EPA" or "Respondent") and failure to fully comply with the Recommended Decision and Order and final Decision and Order issued by the Secretary in the prior matter (Case No. 1992-TSC-5).[2] An amended complaint filed on February 13, 1996, added an allegation of "bad mouthing" or "blacklisting."

By letter dated March 26, 1996, the Wage and Hour Division determined that the weight of the evidence to date indicated that Complainant was a protected employee engaging in protected activity within the scope of the environmental statutes and that discrimination as defined and prohibited by the statutes was a factor in the actions set forth in his complaint. However, the findings were limited to the denial of permission to attend professional conferences including attendant expense reimbursement. The Wage and Hour Division found that the evidence did not support a similar finding in regards to the remainder of the allegations. Complainant appealed this determination on March 29,

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[2] A Recommended Decision and Order finding in favor of the Complainant, Dr. Marcus, was issued in Case No. 1992-TSC-5 on December 3, 1992 by Administrative Law Judge David Clarke (CX 1); a motion for a temporary restraining order and injunction was referred to the Secretary by Judge Clarke by an Order of December 22, 1993; a Decision and Order also finding in Complainant's favor together with an Order denying the requests for injunctive relief was issued by the Secretary on February 7, 1994 (CX 2); an Order of Remand was issued by the Secretary on September 27, 1994 for the purpose of addressing certain factual issues; a Recommended Order of Settlement was issued by Judge Clarke on May 15, 1995, which approved the Final Joint Stipulation of the Parties dated May 8, 1995 (CX 3) that resolved all pending issues; and a Final Order Approving Settlement and Dismissing Complaint was issued by the Secretary on July 3, 1995 (CX 4). I take administrative judicial notice of these decisions and orders, the substance of which is discussed ***infra***. ***See generally*** 29 C.F.R. § 18.201; ***see also*** 29 C.F.R. §§ 18.48, 24.6(e).

1996, and the EPA appealed on April 1, 1996. Following discovery and prehearing proceedings, the hearing in this claim commenced on May 6, 1996, and was adjourned on May 8, 1996, to resume on July 22, 1996.

On May 7, 1996, Complainant requested that the testimony from the medical experts and any medical records submitted as exhibits be placed in a restricted access portion of the case file pursuant to 29 C.F.R. § 18.56 ("Restricted Access") and ***Brown v. Holmes***, 1990-ERA-26 (Sec'y, May 11, 1994) (approving portion of settlement requiring notification to parties pursuant to 29 C.F.R. § 70.26 prior to providing sealed terms of settlement agreement in response to a Freedom of Information Act request). I approved this request and restricted access to Dr. Edwin Carter's testimony appearing at Tr. I at 90-220.[3] Subsequently, I included the testimony of Dr. Ralph Barocas (Tr. XII at 1431-1557), Complainant's testimony regarding his medical conditions (Tr. IX at 1127-30; Tr. X at 1134-70) and Respondent's Exhibits 38 and 39. The restricted access exhibits and transcripts are included in sealed envelopes associated with the file in the instant case, as are the briefs discussing the restricted access information. The sealed testimony will be discussed in an Addendum to this decision that I am also placing under seal. **SO ORDERED.**

A second complaint was filed by Complainant on April 24, 1996, in which he alleged that the Office of Inspector General investigation into his appearance and testimony before the United States Congress was retaliatory and in violation of the environmental statutes. By letter dated June 21, 1996, the Wage and Hour Division determined that the weight of the evidence did not indicate that the allegations in this complaint could be substantiated. On June 28, Complainant timely appealed this decision and requested that this complaint be consolidated with the October 14, 1995, complaint. This motion was granted and the two complaints were consolidated on July 2, 1996.

The hearing resumed on July 22, 1996, and was adjourned again on July 26, 1998. Various schedule conflicts restricted the amount of time available to hold this hearing, so proceedings were held on the following dates: August 12-13 and 15, 1996, September 4-6, 1996, and November 13, 1996.

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[3]The pages of the transcript of these proceedings are not numbered sequentially from volume to volume. There is one set numbered 1-682 (volumes I through III) (pertaining to case number 1996-CAA-03) and one set numbered 1-2219 (volumes IV through XV) (following consolidation of the two cases). Accordingly, references to the transcript will be to "Tr." followed by a volume number "I" through "XV" determined chronologically and the page number. Complainant's Exhibits will be identified as "CX"; Respondent's Exhibits as "RX"; and Administrative Law Judge Exhibits as "ALJ", respectively, followed by the exhibit number. Multiple references to the same event or matter will only appear when deemed to be useful.

The following witnesses testified at the hearing, and their testimony appears at the transcript pages following their names: Dr. Tudor Davies (Tr. I at 48-89; Tr. II at 252-485); Dr. Edwin Carter (Tr. I at 90-220); Dr. Arnold Kuzmack (Tr. III at 498-544 & 619-677; Tr. XII at 1558-1616; Tr. XIII at 1656-1788 & 1812-1865); Brian Holtzclaw (Tr. III at 545-619); Charles Cothern (Tr. IV at 39-71); Complainant (Tr. IV at 72-197; Tr. VI at 461-640; Tr. VII at 645-661; Tr. IX at 977-1130; Tr. X at 1134-1300; Tr. XI at 1305-1392); Michael Rankin (Tr. V at 341-420); Lorraine Fairchild (Tr. V at 203-340 & 421-457); Margaret Stasikowski (Tr. VII at 662-743); Shirley Harrison (Tr. VII at 744-788); Mary Platt (Tr. VII at 789-836); Michael Gaddy (Tr. VIII at 845-902); James Hanlon (Tr. VIII at 903-959); Dr. Ralph Barocas (Tr. XII at 1431-1557); Lynne Ross (Tr. XIII at 1621-1655); Robert Thorlakson (Tr. XIII at 1789-1811); Michael Hamlin (Tr. XIV at 1870-1902); Francis Bonds (Tr. XIV at 1903-1910); Severa Wilson (Tr. XIV at 1911-1922); Julie Street (Tr. XV at 1938-2089); Simon Miller (Tr. XV at 2090-2095); and William Sanjour (Tr. XV at 2096-2210). Portions of the testimony and exhibits are under seal, as discussed above.

The parties stipulated to the admission of Complainant's Exhibits CX 1-8, 15-16, 21-22, 23 (page 1 only), 23 A-B and 29-30 and the Respondent's Exhibits 1-2, 6-7, 10, 12-14, 18, 21 and 23-24. At the hearing, I received those exhibits into evidence, as well as the following: Administrative Law Judge Exhibits 1 and 2; Complainant's Exhibits 14, 24,32-34, 36, 39-42, 46-47, 49-55, 57-59, 64, 68, 73, 78-79, 81-119, 121-148; and the Respondent's Exhibits 22-23, 26-27, 29-30, 33, 38-40, 42-43, 47-50. Respondent's Exhibits 38 and 39 were admitted into evidence but are under seal by virtue of a protective order and RX 41 (identified but not admitted) is also under seal . Although CX 148 (EPA travel documents) and RX 50 (a Comptroller Policy Announcement relating to training sessions) were not submitted until after the hearing, they were provisionally admitted. (Tr. 2081-2082). The testimony of the following witnesses was by agreement submitted by deposition following the hearing and the transcripts have been marked as exhibits as follows: the deposition of Michael Petruska taken on September 17, 1996 (CX 149); the deposition of "Donald Mantkes" (***sic***) taken on July 2, 1996 (RX 50A); the deposition of "Donnell Nantkes" (***sic***) taken on November 5, 1996 (RX 50 B);[4] the deposition of Jonathan Z. Cannon taken on July 15, 1996 (RX 51); and further testimony from Lorraine Fairchild taken by deposition on September 17, 1996 (RX 52), which exhibits are hereby admitted into evidence. **SO ORDERED.**

Following the hearing, the record was held open for the receipt of four post-hearing depositions (discussed above) and the two exhibits that were provisionally admitted, and

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[4] The fact that deponent Nantkes' name appears differently in the two deposition transcripts makes me question the reliability of these transcripts with respect to specifics, such as names, dates, and numbers. However, I will take my reservations into account in determining how much weight should be given to this evidence.

a briefing schedule was established. The exhibits were received on December 2, 1996, and the depositions were received on December 11, 1996, thus closing the record. After both parties were granted several extensions, Complainant's post-hearing brief was received on May 22, 1997; Respondent's post-hearing brief and "Reserved Closing Argument" (relating to the Thrift Savings Plan [TSP] issue) were received on May 20, 1997 and July 7, 1997, respectively; Complainant's reply to Respondent's post-hearing brief and response to the reserved closing argument were both received on September 9, 1997; and Respondent's reply brief was received on September 9, 1997.

Complainant alleges that Respondent failed to adhere to the Decision and Order in the original case and/or separately violated 29 C.F.R. Part 24 through the following:

1. By orally communicating negative information about Complainant and negatively commenting on his protected activities ("bad mouthing");

2. By failing to properly post or circulate (to supervisors) prior decisions and orders issued in his case or otherwise provide guidance and training to supervisors and other employees;

3. By failing to restore him properly to all of the privileges of his prior employment, and specifically by failing to invite him to meetings and conferences, by failing to assign him work consistent with his position description, and by taking other actions inconsistent with his position as a GS-15 Toxicologist and Senior Science Advisor;

4. By failing to properly restore all of his lost fringe benefits and retirement benefits, such as the Thrift Savings Plan [TSP]; and

5. By taking adverse action against him through the circulation of false and/or misleading negative comments to a member of the U.S. Congress concerning Complainant's testimony during special hearings on the Waco incident and through the conducting of an investigation related thereto.

See generally Complainant's Post-Hearing Brief, Findings of Fact and Conclusions of Law at 10-11.

FACTS

Complainant was employed as a GS-15 Toxicologist and Senior Science Advisor with Respondent as of May 13, 1992, at which point Complainant was terminated. (CX 1 at p. 2). Complainant had worked for Respondent for approximately eighteen years as of that time. Complainant filed suit under the Six Acts, alleging that he had been terminated

for drafting and releasing a memorandum warning of potential harm from the use of fluoride, which was contrary to Respondent's official position at the time. ***Id.*** An administrative law judge determined that this termination was in fact a result of Complainant's engaging in protected activity and ordered the EPA to reinstate Complainant to his former position and to refrain from taking adverse actions in the future. (CX 1 at 27-31). Back pay with interest, reimbursement for fringe benefits, and additional compensatory damages in the amount of $50,000 were also awarded. Respondent was further ordered to post a copy of the Decision and Order in a prominent place in Respondent's headquarters and to distribute it to all persons who exercise supervisory control over Complainant. (CX 1 at 1).

The Recommended Decision and Order was accepted by the Secretary of Labor with the exception of the determination of interest due. Accordingly, Respondent was ordered to reinstate Claimant "to his former or comparable position together with the compensation terms, conditions, and privileges of his former employment." (CX 2 at 9-10). Respondent and Complainant entered into a joint stipulation regarding how this would be implemented that also resolved pending issues concerning damages. The Stipulation was approved by the Secretary of Labor (as recommended by the administrative law judge). (CX 4).

As a result of this previous case, Complainant was reinstated by Respondent on June 7, 1994. While he was not returned to his previous position, Complainant was given a position that was purported to be comparable, and was allegedly given the status of a GS-15 Toxicologist and Senior Science Advisor.

Testimony

Dr. William Marcus, Complainant

Complainant has a doctorate in pharmacology and is a Board Certified Toxicologist. (Tr. IV at 72-74; CX 6). He began working for the EPA in January of 1974 as a toxicologist. (Tr. IV at 75). He was subsequently promoted to senior scientist and remained in that position until 1979, when he was selected as the Branch Chief of Toxicology in the Office of Drinking Water. (Tr. IV at 75-76). After a year in that position, an attempt was made to remove Complainant for lack of performance. Complainant testified that he had sufficient materials to rebut this charge. However, instead of fighting the removal, Complainant agreed to take the position of senior science advisor, which he viewed as a promotion. (Tr. IX at 1005-06). He had been in that position title since 1980. (Tr. IV at 76).

In 1989, Complainant was granted his request to work from his home, after it was determined that he had an "acute allergic reaction" to the building in which his office was

housed. (CX 44). Because of this allergy, Complainant has a difficult time attending meetings held in the current EPA office building and becomes ill after about two hours in the building, although his reaction has slightly improved. (Tr. VI at 515).

As a result of his work, Complainant has been published a number of times and received bronze medals from the EPA, as well as recognition for his expertise from other sources. (Tr. IV at 104-06, 121-33; CX 47, 49-54, 59, 75). In spite of these accolades, Complainant was involved in a performance approval plan for unsatisfactory performance prior to his termination. (Tr. IX at 1007).

According to Complainant, the ability to attend conferences has had a significant impact on his career and has allowed him to attain his reputation. (Tr. IV at 79-81). Actual attendance is preferable to reading about the study in the relevant literature, as an attendee has greater access to the analyses of the author and is able to see the conclusions prior to publication. (Tr. IV at 82-83). Such meetings helped Complainant in his study of the effects of lead, benzene and pesticides. (Tr. IV at 83-102; CX 49, 58, 59). Complainant further testified that interaction with other offices in the EPA was crucial to carrying out his duties as senior science advisor. (Tr. IV at 98, 103). Prior to his termination, Complainant went to about six or seven local meetings a year and one or two meetings which would require him leaving the area. (Tr. IX at 1054).

In 1990, Complainant wrote a memorandum on fluoride. (Tr. IV at 114). Because of this memorandum, Complainant began to be relieved of his duties as senior science advisor, and was ultimately terminated from the EPA in March of 1992. (Tr. IV at 115; CX 1 & 2). He was reinstated as a result of a previous whistleblower lawsuit on June 7, 1994. (Tr. IV at 115-16; CX 1 & 2).

Complainant reviewed his current position description at the hearing. (CX 29). Complainant testified that he had been assigned some work involving some of the listed duties. (Tr. IV at 139-40). However, he had not been assigned any work regarding scientific liaison with the Office of Research and Development. In fact, Complainant testified that he had been prevented from doing such work. (Tr. IV at 140-41). This result has been accomplished by the EPA refusing his requests to go to meetings with people from that Office. Prior to his termination, he was allowed to go to these meetings.[5] (Tr. IV at 141; Tr. VI at 527-33). He also feels that he has not been allowed to attend conferences that are essential for him to keep abreast of current scientific knowledge, nor has he been

[5] Complainant estimated that prior to his termination, but during the period in which he worked from home, he spent about 30 percent of his time interacting with other EPA employees. Since his reinstatement, he estimated such interactions (including his meetings with Dr. Kuzmack) would occupy about 1 percent of his time. (Tr. VI at 462).

notified as regularly about upcoming conferences since his reinstatement. (Tr. VI at 494-97, 505-06). Prior to his dismissal, he was kept informed regarding both of these issues. (Tr. VI at 515). Since his return, other EPA employees have been allowed to go on travel to conferences that would have suited his areas of expertise. (Tr. VI at 539-88). It is Complainant's position that his attendance at some or all of these events, meetings and conferences is necessary for his position, and Complainant requested approval to attend some of the meetings.[6] (Tr. VI at 578-79). Of the ones Complainant asked to attend, Dr. Kuzmack informed him that they would be strategy sessions, and that it was unnecessary to have Complainant attend. (Tr. VI at 579).

Despite his desire to attend a number of conferences, on cross examination, Complainant admitted that he was unfamiliar with the work of some of these conferences. He was interested in these conferences and meetings to find out if he would be interested in their topic areas, and to find out "what's going on." (Tr. IX at 1111). Some of these conferences dealt with areas in which Complainant was not involved. (Tr. IX at 1110-16). Further, Dr. Kuzmack did not attend a number of these conferences in his own duties as Senior Science Advisor. (Tr. X at 1181-87).

Complainant testified that he has not been assigned any duties consistent with his job description to work with EPA laboratories, to maintain liaisons with the scientific community in general or to develop strategies for future projects. (Tr. IV at 143-150; Tr. X at 1230-65). Complainant also identified several projects within the EPA in which he felt that his expertise would be useful, including projects that were not within his own division. (Tr. IV at 150-154, 165-68; Tr. VI at 480-93). While he has experience that would be helpful to most other divisions within the Office of Water, he has not been informed as to the type of work being performed in the other divisions. Further, he has not had any interaction with any other branch of the EPA. (Tr. VI at 464-76).

Upon his return to the EPA, Complainant was not given any sort of orientation nor was he introduced to any employee in the Office other than Dr. Kuzmack. (Tr. IV at 152). He no longer receives calls from co-workers other than Dr. Kuzmack. (Tr. VI at 463-64). Complainant also had problems regarding the manner in which calls to him at the office were handled. As a result, Complainant tried to get his home number included in the EPA's employee locator without success. (Tr. VI at 506-08; CX 18). Prior to his dismissal, he had never had this problem, as callers were given his home number. (Tr. VI at 509).

Between the time of the filing of the complaint and its subsequent amendment, Complainant received a call from Brian Holtzclaw regarding a phone conversation with Dr.

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[6] Complainant chose not to attend one conference in Baltimore where he was given permission to go, but his request to stay overnight had been denied. (Tr. IX at 1121).

Kuzmack, as discussed ***infra***. Complainant was surprised that anyone at the EPA would have had such a conversation with someone he did not know. This conversation led Complainant to employ Documented Reference Check ("DRC") and to amend his complaint. (Tr. X at 1207-09). After reviewing the report from DRC (CX 14, discussed ***infra***), Complainant testified that he felt hopeless regarding his current position within the EPA. He felt that if these statements would be made once, they would be made other times as well. It is also his opinion that these statements could do a great deal of damage to his professional reputation. (Tr. IV at 163-73). Complainant testified that reviewing this document was very emotionally disturbing. (Tr. IV at 174-75). On cross examination, Complainant did admit that outside of the DRC inquiry, he had not used any of these people for references, with the exception of Dr. Ohanion, who had not given Complainant a bad recommendation. (Tr. X at 1174-79).

When he was being reinstated, Complainant was pleased to learn that he was being reassigned to Dr. Kuzmack. They had met previously, and Complainant felt as if they had a cordial relationship. (Tr. IV at 175). When he read Holtzclaw's notes regarding his conversation with Dr. Kuzmack, Complainant could not believe it. Complainant stated that reading Dr. Kuzmack's comments was devastating. (Tr. IV at 175-77). The combined effect of these statements was that Complainant felt as if it would "make it impossible for me to get my reputation back." (Tr. IV at 196). According to Complainant, the stress from these incidents manifested itself in physical symptoms such as difficulty concentrating, difficulty sleeping, GI tract symptoms, and a "whopping" headache. ***Id.*** It also made him "grouchy and snappy," and he had difficulty eating. (Tr. IV at 197).

Complainant alleges that his mail is being opened prior to being forwarded to him. According to Complainant, everything that was sent to him from outside of the EPA was opened in this manner. (Tr. VI at 517). He also alleged that once, some stamps that a friend sent him had been removed. Complainant stated that he made several complaints to the secretaries whom he assumed were forwarding the mail. (Tr. VI at 518).

Complainant is also concerned about the amount of money that is reflected on his pay stub as being contained in his CSRS (Civil Service Retirement System) account and his TSP (Thrift Savings Plan) account. (Tr. VI at 520). Because of the inaccuracy on the pay stub, Complainant believes that the amounts that he earned prior to his termination have not been returned to his account. (Tr. VI at 520-22).

On July 26, 1995, Complainant was asked to testify at a Congressional hearing regarding the incident at Waco, Texas. A July 11, 1995 letter was sent to him by facsimile by Congressman William H. Zeliff, Jr., Chairman of the Subcommittee on National Security, International Affairs & Criminal Justice, inviting him to appear as a witness on topics that would be given to him telephonically. (CX 32 at 35-36 [exhibit 5]). Complainant addressed Congress regarding the toxicology and adverse effects of "CS gas" (a form of

tear gas), specifically, the effects it would have on women, children, the elderly and the infirm. (Tr. VI at 599; CX 32, 56). Complainant informed Dr. Kuzmack of the impending testimony, and it was Complaint's impression that Dr. Kuzmack would allow him to spend his time preparing for the testimony. (Tr. VI at 602). Further, Complainant was not told to take leave when he actually testified before Congress. (Tr. VI at 602). Because Complainant prepared the report "as an EPA employee," he placed it on EPA letterhead. (Tr. VI at 604). He did not intend to indicate that it was an official position of the EPA. (Tr. VI at 605). However, the report itself did not indicate that it represented his personal views as opposed to those of the EPA. (CX 32 at 21-30 [exhibit 3]).

A transcript of the Waco Congressional hearing indicates that Dr. Marcus opened his testimony by stating the following:

> Mr. Chairman, members of the committee. I am very honored to be here to present a talk. I am a Senior Science Advisor at U.S. EPA. I am in the Office of Drinking Water. I usually confine my studies to compounds that get into drinking water and cause problems in public water supplies.
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> I was asked to look into CS gas. I did my usual analysis because at EPA -- I have been there for about 21 years -- and my job has been, over that time, to look at the information I could gather about a particular chemical, whether it be animal or human data, analyze the data, and determine what the effects are on people. Try to elicit which particular subgroup is most susceptible and, then, based on all these considerations, determine at what level no effect would be found in the most susceptible subgroup.
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> As a Government toxicologist, I have no particular axe to grind. I am not a Republican or a Democrat. I am just a Government employee.

(CX 56 at 17.) He later stated, in response to questions concerning his consulting work that he could not appear on behalf of a private party "if the Government is a party, even peripherally to the case, I cannot appear" and went on to say, "If it weren't for the fact that I am appearing here for the EPA, I would consider this a conflict of interest." (CX 56 at 55.)

Later during the Congressional hearing, after information was received from EPA indicating that he was not representing the agency, Complainant was asked if he was representing the EPA. (CX 56 at 65). Complainant testified that while he was not representing the EPA "in terms of policy or anything I say can be attributed to them," he was before them "as an EPA employee, as opposed to a private citizen" and was "on Government time. . . getting paid by the Government to be here." (Tr. VI at 615; CX 56).

His rationale for that answer was that the EPA was paying him to attend the hearing. (Tr. VI at 615-18). While there was some confusion regarding his status, a letter from Robert Perciasepe, Assistant Administrator ("the Perciasepe letter"), stating that Complainant was not representing the EPA's official position seemed to clarify the matter. (CX 32 at 6 [exhibit 1]; RX 44; Tr. VI at 624). The Perciasepe letter was jointly addressed to the Chairman of the Subcommittee on National Security, International Affairs and Criminal Justice (Honorable William H. Zeliff, Jr.) and to the Chairman of the Subcommittee on Crime (Honorable William McCollum) and was dated July 26, 1995, the date of the hearing. (CX 32 at 6 [exhibit 1]; RX 44.)

Subsequent to this testimony, Congressman Brewster sent an inquiry to the EPA to clarify Complainant's status at the time of his testimony. (Tr. VI at 619). Jonathan Z. Cannon, General Counsel for the EPA, responded to this inquiry in a November 1, 1995 letter that appears as CX 71 ("the Cannon letter"). The Cannon letter first addressed Complainant's use of EPA letterhead ("Use of Government Property"). It stated that Complainant's "use of EPA letterhead stationery for his testimony appears to contravene" the standards used by the Office of Water in determining when to use letterhead and that "[b]ased upon our review, Dr. Marcus' use of EPA letterhead stationery and other office supplies or equipment to prepare materials for use in other than authorized purposes was not consistent with the applicable government-wide policy." It also stated that "in order to prevent future occurrences of this type of problem, the Office of Water is developing guidance further clarifying the circumstances under which employees may use EPA stationery" and that Complainant's supervisor had "counselled him regarding the appropriate use of EPA property." (CX 71 at 1-2). As to the leave issue ("Employment Status During Testimony," the Cannon letter stated conclusively that Complainant was on an excused absence (although it indicated that he should have made it clear that he was not testifying on behalf of the EPA or presenting an EPA position on the issues.) (CX 71 at 2-3). Finally the Cannon letter stated, with respect to Complainant's possible conflict of interest (Employment as Private Consultant), that there is no limitation as to testimony on Federal employees appearing before Congress such as there is in court or administrative proceedings and that Complainant's testimony concerning a potential conflict of interest reflected his misunderstanding. (CX 71 at 3-4).

Complainant interpreted the Cannon letter as a representation by the EPA that he had lied to Congress. (Tr. VI at 629). It is his opinion that he was on regular pay time, not an excused absence or administrative leave. (Tr. VI at 638).

Because of the confusion surrounding his testimony, the Inspector General's office began an investigation of Complainant. Complainant testified that he did not know of the Inspector General's investigation into his Waco testimony until after he had filed the current suit. (Tr. VI at 592-93; CX 32). When he learned of the investigation, he could not understand why the Inspector General's office would be interested in his Congressional

testimony regarding the Waco matter. (Tr. VI at 597). The Special Agent informed Complainant that they wanted to speak to him without his attorney. (Tr. VI at 598). According to the Complainant, this incident caused him and his wife to experience several stress-related symptoms. (Tr. VI at 598-99). The investigation did not uncover any wrongdoing on the part of Complainant. (CX 32; RX 32).

Complainant does not believe that he has been restored fully to his position as senior science advisor. (Tr. VI at 640). Since his reinstatement, he has not had the opportunity to read and review "the science" done within the Office of Water that contained material regarding the health effects of chemicals on people and animals. Prior to his termination, such review was a major part of his position. (Tr. VII at 659-60). Basically, Complainant feels that prior to his termination, he was able to go to a lot of different meetings, never had trouble getting travel approved, could interact with his peers both inside and outside the EPA, and was directly involved with a lot of the research that was going on within the EPA. Now, Complainant feels as if he is in a "sterile environment." (Tr. X at 1266). He does not believe that his working at home has caused this isolation. (Tr. X at 1267-68).

There have been instances where Complainant misrepresented his qualifications under oath when being called as an expert witness. Some of these instances were even at issue in the prior case. (Tr. IX at 978, 984, 990-1001; Tr. X at 1180, 1220-27; CX 127). Even considering these instances, I find that Complainant's testimony in these proceedings regarding the conditions and aspects of his position before and after his termination is credible.

Testimony of Dr. Arnold Kuzmack

Dr. Arnold Kuzmack is a Senior Science Advisor with the EPA, a position he has held since 1991. (Tr. III at 499). Dr. Kuzmack was thus in this position during the controversy that surrounded the original termination of Complainant. (Tr. III at 619-20). He reports to Dr. Davies and is the immediate supervisor to Complainant. Prior to taking this position, Dr. Kuzmack was a division director for the program development and evaluation division in the Office of Drinking Water. (Tr. III at 499). He meets with Complainant approximately every two weeks. Because of Complaint's allergies, they are unable to meet in the EPA's building.[7] Thus, these meetings take place elsewhere, generally at a McDonald's in the area. They also use faxes, the phone and E-mail to keep in touch regarding their work. (Tr. XII at 1605). Despite the current litigation, Dr. Kuzmack

[7] The Office of Water was planned to move into a new building in 1999, although that move may not occur. (Tr. XIII at 1865).

gets along with Complainant personally and has had no problems with his work since his return. (Tr. XIII at 1843-44).

According to Dr. Kuzmack, Complainant is an excellent toxicologist with a national reputation. However, he has no opinion as to whether the EPA is utilizing Complainant's expertise to its fullest advantage. (Tr. III at 503).

When Complainant returned to work, there was a standing order that any incoming calls for Complainant be referred to Dr. Kuzmack, who would then attempt to determine the subject matter of the call and would direct the call to others if he felt that they were better equipped to give an answer. (Tr. III at 503-04). When Complainant expressed some concerns regarding the manner in which his phone calls were being handled, Dr. Kuzmack informed Complainant that he felt that the calls were being handled in a reasonable manner.[8] (Tr. XII at 1601).

In this respect, Dr. Kuzmack remembered receiving a call from Brian Holtzclaw requesting Complainant's telephone number in regards to a Superfund site. During this conversation, Dr. Kuzmack informed Holtzclaw about Complainant's past history with the EPA and explained that the EPA had tried to fire Dr. Marcus. Dr. Kuzmack also recalled responding to a question of Holtzclaw's that while he may be casting Complainant in a bad light, he needed to protect the agency. He specifically mentioned that Complainant had been involved with fluoride, and had taken a position contrary to that of the agency. Dr. Kuzmack mentioned this call to Dr. Davies. (Tr. III at 505-12). He did not recall making the other statements contained in CX 15, a letter which incorporates Brian Holtzclaw's written summary of the conversation. (Tr. III at 514-15). He did not feel that the statements he made in the conversation constituted "bad mouthing" Complainant. (Tr. III at 516). This was the only occasion where he received a request such as this, and he felt that it was abnormal as it was outside the normal agency channels. (Tr. III at 519-20). Even after reading the decision in the previous case, Dr. Kuzmack still felt that it was his responsibility to inform the agency's representative of Complainant's history. (Tr. III at 652).

Despite the fact that Dr. Kuzmack is Complainant's supervisor, he had never seen or received a copy of the administrative law judge's decision in the original claim until two months after Complainant's reinstatement.[9] In fact, it was Complainant himself who

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[8] Only after the Department of Labor's investigator began looking into the present complaint did the EPA consider establishing voice mail for Complainant. (Tr. XII at 1602).

[9] Dr. Kuzmack later testified that he had received the Secretary of Labor's decision from the personnel office when Complainant was reinstated. (Tr. XII at 1583).

provided Dr. Kuzmack with a copy of the opinion. He was not provided with a copy by the agency. (Tr. III at 621-23). Further, Dr. Kuzmack did not recall seeing the decision posted on any of the EPA's bulletin boards. (Tr. XIII at 1736). Complainant's return to the agency was announced at a senior staff meeting by Dr. Davies. (Tr. XII at 1568). Dr. Kuzmack further testified that other employees had inquired whether Complainant had started back to work. (Tr. XII at 1569).

When Complainant went to a conference in Annapolis, he was denied compensation for an overnight stay while another agency employee that attended the same conference (albeit an employee who was not under Dr. Kuzmack's supervision) was granted such compensation. (Tr. III at 624-28 & 657; CX 9 at 55-58). Further, Complainant's attendance at a conference in Baltimore was approved without reimbursement of expenses.[10] (EX 23A). Dr. Kuzmack did acknowledge that Complainant is the Office of Water's most senior expert on the topic of benzene. Despite this fact, Complainant was denied authorization to go to an international conference on benzene because of the low priority that the office had placed on the topic. (Tr. III at 632-35). Further, several other people from the agency were already attending the conference. (Tr. III at 638). Dr. Kuzmack's testimony also included speculation regarding the number of assignments that could be given to Complainant that would either enhance his expertise or expand his general knowledge. (Tr. XIII at 1740-50 & 1812-30).

While Dr. Kuzmack testified about the number of people attending several other meetings and conferences, he stated that he could not testify as to the reason for their attendance as he is not their supervisor. Further, he did not believe that the topics of these meetings and conferences were within Complainant's specialty or that they were of general interest to him. (Tr. III at 639-46, 662; Tr. XIII at 1673-86).

Of the requests that Complainant made to attend certain conferences, Dr. Kuzmack could remember times where travel money was restricted, so he could not attend all of the conferences in which he had an interest. (Tr. XIII at 1655-59). Since that time, Complainant has attended conferences in Virginia and Maryland. (Tr. XIII at 1660). Dr. Kuzmack suggested to Complainant that he attend a meeting of the International Life Sciences Institute ("ILSI"), at which point Complainant advised him that he was on the ILSI mailing list.[11] (Tr. XIII at 1664-65). Dr. Kuzmack informed Complainant that he was free

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[10] According to Dr. Kuzmack, even if attendance is approved without reimbursement of expenses, a person may still have parking and mileage paid. (Tr. III at 630-31).

[11] According to Dr. Kuzmack, the ILSA has "a variety of different types of activities including a periodic, maybe monthly or so, seminar in Washington on topics in risk assessment." (Tr. XIII at 1664).

to go to any of these meetings of ILSI, but Complainant responded that he did not go because of the problems in parking at these events. (Tr. XIII at 1664-65). Dr. Kuzmack did not consider sending Complainant to the water subcommittee meetings of the Committee on Environment and Natural Resources (CENR), as they were coming to an end. (Tr. XIII at 1667-69).

Dr. Kuzmack was also questioned about the Water Quality Institute.[12] It is Dr. Kuzmack's opinion that Complainant is suitable to be an instructor at the Institute. However, this is not one of his duties. (Tr. III at 647)

While the agency normally selects individuals to make presentations at scientific conferences, Dr. Marcus has not been selected to make such a presentation since his reinstatement. (Tr. III at 623). Dr. Kuzmack suggested that this may be due, in part, to the fact that Complainant has not submitted a proposal or abstract that has been selected for presentation, nor has he been asked to chair a panel. (Tr. III at 654).

Dr. Kuzmack admitted that he did not invite Complainant to attend office meetings with him, or even in place of him when he could not attend. (Tr. III at 647-51). Dr. Kuzmack indicated that he is required to attend senior staff meetings as a senior science advisor, while Complainant is not. (Tr. XII at 1608). Dr. Kuzmack admitted that more could be done to integrate Complainant into the meeting process. (Tr. XIII at 1830-43).

As for Complainant's leave time to testify before Congress, Dr. Kuzmack stated that he decided to allow him to remain in pay status as "it was a general government-wide issue, and therefore, appropriate for the government to pay him to help Congress with that issue." (Tr. XII at 1585). He did not use the term "excused absence" to describe the leave and still does not consider that term to be an accurate description of why he allowed Complainant to remain in pay status. (Tr. XII at 1585-86). Dr. Kuzmack also testified that the investigator's notes of his interview regarding Complainant's leave do not accurately reflect what he told the investigator. (Tr. XII at 1588). The notes indicate that Dr. Kuzmack had a discussion with Dr. Davies concerning Complainant's leave time. (CX 32 at 38). It is Dr. Kuzmack's recollection that he told the investigator that he had briefly mentioned it to Dr. Davies. (Tr. XII at 1588-89).

When Dr. Kuzmack became aware that Complainant had placed his testimony in the Waco hearings on agency letterhead, he confronted Complainant as to why he had

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[12] The Water Quality Institute is a series of training courses that are put on in different places around the country dealing with "the levels of chemicals that are necessary in the water to protect against either adverse human health effects or adverse ecological effects." (Tr. XIII at 1677).

done so. Complainant told him that he was afraid that it was a no-win situation as to whether it was on letterhead or was not. (Tr. XII at 1594). Dr. Kuzmack did not inform Complainant at this point that he should not have used letterhead. (Tr. XIII at 1760). Dr. Kuzmack testified that he agreed with the agency's response to the Congressional inquiry regarding Complainant's testimony as to both the letterhead and the leave issue. (Tr. XII at 1596-97; RX 35). Dr. Kuzmack did not feel that Complainant sufficiently explained the manner of his appearance in the testimony. (Tr. XII at 1599).

Testimony of Dr. Tudor Davies

Dr. Tudor Davies is currently the Director of the Office of Science Technology in the Office of Water for Respondent, and has held that position since 1991. (Tr. I at 49). Complainant reports indirectly to Dr. Davies. Dr. Davies was Complainant's immediate supervisor at the time of his termination, and was directly responsible for that termination. (Tr. I at 50). Complainant was reinstated with a classification of "senior science advisor working with Dr. Arnie Kuzmack, who is a senior science advisor to the Office of Water." (Tr. I at 57). Dr. Davies is Dr. Kuzmack's supervisor.[13] (Tr. I at 50).

Upon return, Complainant "was given work that had him reviewing scientific work for the Office of Water that led to health advisories, . . . providing toxicological advice to the Office of Water." (Tr. I at 58). Further, Dr. Kuzmack assigned projects to Complainant as necessary. (Tr. I at 58-59). Complainant's job performance evaluations since his return have been rated as fully successful all the way up to outstanding. (Tr. I at 73-76).

Dr. Davies did not provide Dr. Kuzmack with a copy of the Decision and Order from the previous complaint. (Tr. I at 67-68). Dr. Davies stated that he was "not sure frankly that it was my duty" and noted that the decision was extensively discussed at a staff meeting. (Tr. I at 68). Dr. Davies also admitted that no discussions were held on dealing with the difficulties that would be encountered due to Complainant's working out of his home. (Tr. I at 72-73).

Dr. Davies recalled speaking with Mike Rankin, and subsequently learned that Mr. Rankin works for Documented Reference Check. (Tr. I at 76-77). Dr. Davies stated that he did speak with Rankin on March 6, 1996. However, Dr. Davies had a "somewhat different recollection" of the conversation than the one transcribed by Rankin. (Tr. I at 79). Dr. Davies further stated that while he could not recall saying that Complainant's interpersonal skills were "no good," he could not deny saying that either. (Tr. I at 79-80).

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[13] Dr. Davies had tried to find Complainant a position in other offices, so that Complainant would not be in Dr. Davies' chain of command, but none were available at the time. (Tr. I at 60).

Dr. Davies also stated that he did say something along the lines of one quote reported by Rankin, to the effect that "[Complainant] has taken positions on things like fluoride, which he takes his own opinion outside and represented his opinion as somewhat as the agency's opinion, and we are not in concurrence on his opinion with fluoride." (Tr. I at 81). Dr. Davies also thought that he may have discussed Complainant's stance on fluoride with other people since his reinstatement. (Tr. I at 82). On cross-examination, Dr. Davies stated that he thought Complainant's interpersonal skills are very good. His concern "was how he dealt with management decisions." (Tr. II at 355).

Dr. Davies agreed that attending different meetings and conferences regarding toxicological matters would contribute to Complainant's professional development; however, this was true for all employees, and did not necessarily mean that the EPA could pay for all such conferences requested by all employees. (Tr. II at 351). Dr. Davies was involved in decisions regarding resource cutoffs with respect to attendance at these conferences. Division Directors would make lists prioritizing their travel requests, and he and Hanlon would do the same for the Office of Water. (Tr. II at 261). If Hanlon were confused about Complainant's role in the Office of Water, then that could lead to problems in regards to travel prioritizations regarding Complainant. (Tr. II at 265). Further, Hanlon was sent to a conference regarding the Great Lakes Initiative,[14] which was being worked on by Complainant, despite the fact that Hanlon's role was primarily administrative, due in part to the fact that Dr. Kuzmack was also attending. (Tr. II at 280-85; CX 9 at 40).

Dr. Davies is also involved in the Water Quality Academy.[15] Dr. Davies determines how often the Academy is held, based on budgetary considerations. (Tr. II at 293). Employees of EPA would be sent to teach different sections based on the curriculum of the Academy and the specialties of the employees. (Tr. II at 295). Dr. Davies never considered whether Complainant had the qualifications to teach at the Academy. (Tr. II at 297).

During 1995, the EPA was experiencing budget difficulties. As a result, Dr. Davies had to adjust his methods for approval of conferences. (Tr. II at 331). Dr. Davies could then only approve travel that was, based on his interpretation, for "events significant to EPA's mission." (Tr. II at 331-32; RX 23). Accordingly, even if an employee were

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[14] The Great Lakes Initiative is a project involving toxicologists studying the effects of mercury on water.

[15] The Water Quality Academy is a course administered by the Office of Water to instruct people who work in environmental programs as to "the background to water quality standards and the regulations and how they can be implemented and used in the states." (Tr. II at 290).

requested to speak at certain conferences, travel would not be approved unless it was directly involved with the EPA's mission. (Tr. II at 335).

It is Dr. Davies' opinion that the major barrier obstructing Complainant's re-association with the office is the fact that he is unable to work in the main EPA building. A lot of work in the office is done in a work group type format, and Complainant's inability to participate in these situations has hindered his professional development. (Tr. II at 401-02). However, Dr. Davies has not attempted to formulate a plan that would allow the office to deal with Complainant more efficiently. (Tr. II at 408).

Travel is prioritized for employees who are giving invited papers, participating in the organization of a meeting, or representing the EPA at a conference for some policy reason. An employee can be at any level or have any job description and still have his or her travel prioritized due to a particular role at a conference. (Tr. II at 444). Dr. Kuzmack, whose primary specialty is in systems, was selected to attend some of these scientific conferences. (Tr. II at 434-35). Dr. Davies' testimony reflects that both he and Hanlon, who would have been involved in approving travel to conferences, appeared confused as to Complainant's exact role (if any) in the office. (Tr. II at 374).

Testimony of Dr. Edwin Carter

As noted above, Dr. Edwin Carter's testimony is under seal and will be discussed in an Addendum that is also under seal.

Testimony of Brian Holtzclaw

Brian Holtzclaw is currently employed by the EPA as an Enforcement Project Manager for the cost recovery section in Region IV in Atlanta. He has been working for the EPA since 1988. (Tr. III at 545). This position, based in the waste management division, relates to the Superfund Program. His primary duties include investigation, compliance, and enforcement of the laws that pertain to cost recovery in Superfund clean-ups. (Tr. 546).

Holtzclaw became familiar with Complainant when he was working on a community-based environmental protection project and cited one of Complainant's toxicological reports in his own report. Complainant was also familiar with "pesticides/herbicides issues" which were useful to Holtzclaw on some of the superfund sites. (Tr. III at 548-49).

Holtzclaw also knew of Complainant due to the fact that he had previously filed a whistleblower complaint using Complainant's attorneys.[16] (Tr. III at 558, 574-75).

On January 25, 1996, Holtzclaw tried to get in touch with Complainant for help on a specific superfund site called Arlington Blending. (Tr. III at 549; CX 15). There was a need for an expert witness in that case, and Mr. Holtzclaw volunteered to find one. (Tr. III at 576). He had Dr. Marcus' home phone number, but could not locate it. (Tr. III at 575-76). He called the number provided by the EPA national locator, and reached a Secretary who transferred him to Dr. Kuzmack's voice mail. Dr. Kuzmack returned that phone call on the same day. During this conversation, he began taking notes and thus formed a draft of the letter appearing as CX 15.[17] (Tr. III at 549-50; CX 16 [contemporaneous notes]). According to Holtzclaw's notes and his subsequent letter to Complainant regarding this conversation, Dr. Kuzmack questioned Holtzclaw as to his need for Complainant's number. Further, Dr. Kuzmack asked, "Aren't you aware that the EPA tried to fire Dr. Marcus and they did not succeed? Aren't you aware that he argued against fluoridation?" (CX 15; CX 16).

Testimony of Charles Cothern

Charles Cothern is a GS-14 Senior Program Analyst with the EPA, and has been employed in that capacity for 18 years. (Tr. IV at 40). His current position is a "temporary assignment" with the Sustainable Development Indicators Group, which is not a part of the EPA, but is connected to the Counsel of Environmental Quality and housed in the Department of the Interior. (Tr. IV at 40-41). Cothern is a friend and colleague of Complainant's. They have worked together for over 15 years, and have published several papers together. (Tr. IV at 43-44). Cothern holds Complainant in the "highest regard" as a scientist, and even considers him an international expert on arsenic, a subject on which they had written an article. (Tr. IV at 44-45).

Cothern testified to the importance of attending scientific meetings as vehicles for learning what research was being done and for keeping abreast of the current thinking. (Tr. IV at 46). Cothern had worked with Complainant while he was Senior Science Advisor with the EPA, and is familiar with the role of these positions in the agency. (Tr. IV at 48-51). Cothern stated that it is essential for a person in such a role to attend conferences

[16] Neither Complainant nor his attorneys requested that Holtzclaw make the call that was the subject of his testimony. (Tr. III at 613). However, it is worth noting that Holtzclaw had also consulted with Dr. Carter as a result of this prior representation. (Tr. III at 611).

[17] Holtzclaw testified that this letter correctly described the conversation he had with Dr. Kuzmack. (Tr. III at 550).

to keep current with the contaminants which are handled by the EPA. (Tr. IV at 51-52). However, he did understand that travel had been curtailed by the EPA in 1996 due to budgetary restraints. (Tr. IV at 59). Further, Cothern agreed that the topics of these conferences should be relevant to the person's position. (Tr. IV at 65-66).

Testimony of Michael Rankin

Michael Rankin is Chief Service Officer for Documented Reference Check ("DRC"). (Tr. V at 344). In his position with DRC, Rankin checks the references of clients by contacting these references and duplicating "the same process that a personnel manager would go through if they were considering that applicant for employment." Rankin has conducted numerous reference checks over the past six years. (Tr. V at 345). Rankin does not try to conduct these checks so as to obtain a negative report. (Tr. V at 391). In the majority of cases, DRC does not receive negative information from those contacted. (Tr. V at 355).

Clients do not give the questions to be asked during these checks; rather, representatives of DRC base their questioning on either the client's resume or the names and addresses of former employers. (Tr. V at 353-54). Rankin takes notes while conducting these reference checks, and then transcribes them into a report for his client. He tries not to be too leading or intense in conducting these checks. (Tr. V at 346). While the transcriptions are not certifiably accurate, DRC does take care to reduce the errors within the transcript. Rankin starts with a written outline of questions written prior to the conversation, most of which are general questions asked in every situation. (Tr. V at 382-84). As the conversation progresses, Rankin may ask follow up questions to fit the situation. (Tr. V at 384-85). The answers are then written down during the conversation, and transcribed immediately thereafter. (Tr. V at 347-48; 352). Further, once the notes are transcribed, a second person checks the transcription against the notes. (Tr. V at 402).

DRC and Rankin were hired to conduct such a reference check for Complainant. (CX 14). Rankin conducted "reference checks" of Dr. Edward Ohanian, Dr. Tudor Davies, Margaret Stasikowski, and Jennifer Zavaleta. (CX 14). Rankin stated that the transcription contained in Complainant's Exhibit 14 accurately reflects the conversations that he had with these people. (Tr. V at 348-51).

Of the reference checks conducted on behalf of Complainant, two provide cause for concern: those of Dr. Tudor Davies and Margaret Stasikowski.

According to Rankin's report, when he asked Dr. Davies about Complainant's interpersonal skills with management, Dr. Davies replied, "No good." (CX 14 at 3). Rankin followed up by inquiring into the problem with those skills. Dr. Davies answered that it may be that Complainant was not diplomatic enough. Further, when asked about his comment

as to Complainant's having "his own opinion about things," Davies responded, "He has taken opinions on things like fluoride, which he takes his own opinion outside, and represented his position as somewhat the [EPA]'s opinion, and we are not in concurrence on his position with fluoride." (CX 14 at 3-4).

The other reference check that is relevant to these proceedings is that of Margaret Stasikowski. After providing the background, Rankin stated that, in regards to Complainant, "we do show a title of Board Certified Toxicologist?" to which Stasikowski stated, "Well, this is going to be a problem." (CX 14 at 4). When Rankin inquired as to what the problem was, Stasikowski indicated that she would rather not speak about Complainant, which led to the following exchange:

> MIKE RANKIN: "Is there anyone you would suggest that we should speak to?"
> MARGARET STASIKOWSKI: "Well, it's sort of a difficult situation."
> MIKE RANKIN: "What do you mean?"
> MARGARET STASIKOWSKI: "I would like to be honest, but this has been a very difficult personnel issue for quite a long period of time for us in the agency."
> MIKE RANKIN: "My goodness."
> MARGARET STASIKOWSKI: "I almost feel like I need to call someone in our General Counsel's Office to see what's the best approach in dealing with that."
> MIKE RANKIN: "You mentioned General Counsel, is this a matter of litigation?"
> MARGARET STASIKOWSKI: "Yes, I think there was a litigation between the agency and Mr. Marcus and the agency lost."
> MIKE RANKIN: "Every employer's nightmare."
> MARGARET STASIKOWSKI: "So if you have access to such records, that would probably give you a lot of information."

(CX 14 at 5).

Testimony of Lorraine Fairchild

Lorraine Fairchild is "team leader for the General Crimes Unit, Office of Investigations, Washington Field Division, Environmental Protection Agency" which is part of the Office of Inspector General. (Tr. V at 204). It was Fairchild's responsibility, upon receipt of a complaint from Perciasepe, to investigate whether Complainant had made false statements to Congress, in particular dealing with what type of leave, if any, Complainant was on when he testified in the Waco proceedings. (Tr. V at 212-13). As a

result of this inquiry, Fairchild determined that Dr. Marcus had been given permission to testify on government time, "but that he was to testify as a private citizen." (Tr. V at 216).

This case was later reassigned to Special Agent Michael Gaddy. (Tr. V at 220). This was due in part to her supervisor's concern that she had been involved in a previous investigation of Complainant.[18] (Tr. V at 221). After the reassignment, Fairchild continued to play a part in the investigation by reviewing the work of the agents investigating the claim and providing them with her advice and assistance. This was done in her role as team leader for the General Crimes Unit, and the agents were allowed to have "a certain amount of independence" in conducting the investigation. (Tr. V at 222-23). The agents to which this case was reassigned, Gaddy and McCann, had no involvement in the prior investigation of Complainant. (Tr. V at 224).

When the case was reassigned to Gaddy, Fairchild gave him her personal file on Complainant, which contained documents related to the prior case. (Tr. V at 230). She also informed both of the new agents that Complainant had filed a complaint as a result of the previous investigation, and that they "should be more careful in taking their notes in case it happened again." (Tr. V at 231). She also informed Agent Gaddy that he should check into whether Complainant was actually a senior science advisor as he testified before Congress, in part due to the fact that this was an issue in the previous complaint. (Tr. V at 261).

Fairchild does not remember seeing a copy of the decision in the original case posted around her office at the EPA, although she believes she read a copy at some point. (Tr. V at 314-15).

Fairchild supplemented her testimony at a deposition held on September 17, 1996. (RX 52).

Testimony of Margaret Stasikowski

Margaret Stasikowski is currently the Director of the Health and Ecological Criteria Division in the Office of Water, Office of Science and Technology in the EPA. (Tr. VII at

[18] Although Fairchild had previously been involved in an investigation of Complainant, it is not unusual for the same investigator to be assigned to a second complaint regarding the same individual. Fairchild plausibly testified that this practice is followed in the interest of economy. (Tr. V at 209). Further, Fairchild testified that when the investigating officer makes a report, the officer does not recommend what action should be taken against the subject of the investigation. The report merely presents the facts that were uncovered by the investigation. (Tr. V at 225).

662). Prior to taking this position, she was the Director of Drinking Water Health and Criteria and Standards Division, Office of Drinking Water, Office of Water. In this position, she was Complainant's supervisor as of the time of his termination from the EPA. (Tr. VII at 663). In fact, Stasikowski was the official at the EPA that drafted the proposed letter of termination. (Tr. VII at 664).

Stasikowski testified at the hearing that she was never given any instructions from any of her supervisors on how to interact with Complainant. She has not spoken with Complainant in a long time, and has not instructed any of her subordinates to seek his advice on any scientific matters.[19] (Tr. VII at 665).

Stasikowski did not know that Complainant was supposed to be a Senior Science Advisor upon his reinstatement. (Tr. VII at 671-72). Stasikowski still believes that Complainant should have been terminated from the agency. (Tr. VII at 673). She was not involved with any of the discussions regarding his reinstatement. (Tr. VII at 685). At this time, she still does not feel comfortable with Complainant and does not feel as if she could work with him. (Tr. VII at 716 & 736).

Stasikowski does remember speaking with Rankin of DRC. She did not take any notes of the conversation. Further, it was her belief that Rankin was a prospective employer of Complainant. (Tr. VII at 685). She only has a general sense of the conversation; she does not recall if Rankin's report contains her exact words. (Tr. VII at 685-89). Nevertheless, she admitted that the transcript is an accurate portrayal of the issues discussed. (Tr. VII at 686-90 & 710-12; CX 14). On cross examination, Stasikowski stated that she thought Rankin was from Kendall Science. She also felt some tension as she did not think that she should be a reference for Complainant. (Tr. VII at 703 & 741).

Testimony of Shirley Harrison

Shirley Harrison is currently the Secretary to the Deputy Director in the Office of Science and Technology under the Office of Water at the EPA. She has worked in the agency for over thirteen years now. (Tr. VII at 745). Harrison's duties include assisting Complainant with his travel, time-keeping, and mail. (Tr. VII at 746). No one ever met with Harrison in an effort to integrate Complainant back into the Office. (Tr. VII at 751-52).

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[19] While Stasikowski never sought out Complainant's advice on matters being considered by her division, she also testified that she did not seek help from Complainant's supervisor either. (Tr. VII at 668). Assignments that come into her division are normally assigned to individuals who work in that division. (Tr. VII at 697).

According to Harrison, she transferred phone calls intended for Complainant to Dr. Kuzmack because she had received no instructions about how to handle Complainant's phone calls. She knew that he worked from his home, but would not give out his home phone number because it is "never" done. (Tr. VII at 747). If Dr. Kuzmack were not available, the callers would be instructed to leave a message on his voice mail. (Tr. VII at 759). No voice mail had been established for Complainant at that time. (Tr. VII at 760).

When Harrison receives mail for Complainant, she usually sends it to him as soon as she receives it via first class mail. Occasionally, she has inadvertently opened his mail. When that happens, she staples it closed, writes "opened by mistake," and signs her name. (Tr. VII at 748). She has no knowledge of anyone else in the office opening Complainant's mail. All of his mail is delivered to her desk, although occasionally some of his mail is erroneously placed in Dr. Kuzmack's box. (Tr. VII at 749-50). Complainant has never expressed any concerns regarding his mail to her. (Tr. VII at 750). Finally, when notices of professional conferences were being distributed, Harrison did not mail these to Complainant and was not instructed to do so. (Tr. VII at 765).

Testimony of Mary Platt

Mary Platt is a Program Analyst in the budget and program management staff at the EPA. (Tr. VII at 789). She is located in the Office of Water, Office of Science and Technology, where she has worked for over 23 years. (Tr. VII at 789-90).

As a part of her job, Platt tracks the resources available for travel and the expenditures for the fiscal year, although she is not responsible for approval of travel. (Tr. VII at 790). Platt is also responsible for periodically updating the phone number listings for the Office of Science and Technology, and for "generating paperwork for hires, reassignments, promotions, that type of thing." (Tr. VII at 791-92).

It was because of these duties that Platt was involved in the reinstatement of Complainant. Platt filled out the necessary time cards for his back pay and generated the personnel action that actually reinstated Complainant into his current position. (Tr. VII at 792-93).

Platt is not sure who made the decision to list the main office as Complainant's phone number in the EPA phone book. (Tr. VII at 807). However, Complainant has not asked Platt to put his home number in the EPA phone book, and Platt was not aware of anyone that has a home number so listed. (Tr. VII at 800).

Platt testified that in 1996, the EPA placed restrictions on travel. The agency did not receive an appropriation, and was thus working with an extremely limited budget. Although some people did travel, individuals could not necessarily count on going to a

conference just because of an interest. (Tr. VII at 800-01). Further, she testified that there is an administrative fund outside of the travel budget that may be used to pay for registration at conferences. (Tr. VII at 808-09).

Testimony of Michael Gaddy

Michael Gaddy is a Special Agent, Criminal Investigator in the Office of Inspector General of the EPA. (Tr. VIII at 845). He has been working at the EPA since March of 1994.[20] (Tr. VIII at 846). Gaddy took over the investigation of Complainant from Fairchild. However, Fairchild continued in a supervisory role as the team leader. (Tr. VIII at 858).

Gaddy testified that Fairchild informed him in a briefing that the investigation of Complainant would be transferred to him. In so doing, Fairchild presented Gaddy her personal file from the old case, but Gaddy never reviewed the old case file. (Tr. VIII at 849-50, 887). She also informed Gaddy that he should be careful, and that Complainant had made some "mistruthful statements" in prior testimony. (Tr. VIII at 851-52). Gaddy testified that Fairchild may have discussed Complainant's use of his title with Gaddy and the other agent assigned to the case, Mary McCann. (Tr. VIII at 854).

The major part of Gaddy's investigation revolved around Complainant's use of leave to testify at the Waco hearings. Complainant told Gaddy that he was on regular pay status when he testified, and the investigation demonstrated that he was not put of leave and testified on his normal duty hours. (Tr. VIII at 873). Gaddy conceded that a letter from General Counsel Cannon to Congress may not have been totally correct when it stated that he was on an excused absence. (Tr. VIII at 874-75).

Testimony of James Hanlon

James Hanlon works with the EPA as the Deputy Director of the Office of Science and Technology and the Office of Water. In this position, he reports to Dr. Davies. (Tr. VIII at 903). His responsibilities include "scientific, technical, and managerial functions." (Tr. VIII at 905). At times, he also had discussions with Dr. Davies regarding which employees should attend upcoming scientific conferences. (Tr. VIII at 906-07).

In September of 1994, Hanlon attended a conference in New Orleans, Louisiana. (Tr. VIII at 907; CX 9 at p. 40). The purpose of this conference was to discuss "issues relative to mercury occurrence in the environment." (Tr. VII at 908). Typically, Dr. Davies or Hanlon would attend conferences such as this which may have a direct impact on office

[20] Gaddy noted that during this time, he has not seen a copy of the Decision and Order in the original claim posted at EPA headquarters as ordered by that decision. (Tr. VIII at 846).

policy. (Tr. VIII at 910). Hanlon did not remember discussing whether Complainant should attend this conference, nor did Hanlon know whether Complainant had any background in the area of mercury. (Tr. VIII at 910-11). In fact, Hanlon testified that the only knowledge he has of Complainant's expertise is with respect to fluoride and Complainant's comments related to that topic which led to the improper dismissal. (Tr. VIII at 911). Hanlon was not even aware that Complainant was a senior science advisor until after his deposition in this matter. (Tr. VIII at 919).

According to Hanlon, it is appropriate for a senior science advisor to "keep himself or herself current on the state of science." (Tr. VIII at 923). However, due to limited travel resources, decisions must be made regarding who to send to particular conferences. As a result, people are generally sent to those conferences "that directly relate to the current assignment or what may be expected or anticipated as an assignment for individuals on the staff." (Tr. VIII at 924). However, Complainant was never added to any interoffice routing slips due to "administrative simplicity." (Tr. VIII at 926). When Hanlon was questioned regarding the exact number of senior science advisors within the office, Hanlon responded, "Senior science advisors within the Office of Science and Technology include Arnie Kuzmack and [Complainant] and only one of those senior science advisors works directly for Mr. Davies, and that's Mr. Kuzmack." (Tr. VIII at 927).

Testimony of Dr. Ralph Barocas

As noted above, the testimony of Dr. Ralph Barocas (which is essentially rebuttal testimony to that of Dr. Edwin Carter) is under seal and will be discussed in an Addendum that is also under seal.

Testimony of Lynne Ross

Lynne Ross is the Legislative Director of the Legislative Division of the Office of Congressional and Legislative Affairs with the EPA. (Tr. XIII at 1622). Her duties are focused on Congressional inquiries. She coordinates testimony, handles briefings, and drafts and clears particular testimony. ***Id.***

On approximately July 26, 1995 (the date of the Waco Congressional hearing), Ross received an inquiry from Bob Brink, the Deputy Assistant Attorney General at the Justice Department in the Office of Legislative Affairs. Brink's inquiry regarded whether Complainant's testimony in regard to the Waco hearings was being done in his official capacity. (Tr. XIII at 1623). The reason for the inquiry was that Complainant's testimony had been submitted on EPA letterhead, and the committee had some question as to Complainant's status. (Tr. XIII at 1624). Ross checked her documentation, and determined that Complainant was testifying in his individual capacity. (Tr. XIII at 1629-30; RX 45).

Brink then requested that Ross submit a letter to the subcommittee clarifying that Complainant was not there as an EPA representative. She began this letter immediately, and sought advice from the EPA's Office of General Counsel. She worked with Gary Guzzi, General Counsel Jonathan Cannon, and a little with Bob Perciasepe, and produced a clarification within an hour (the Perciasepe letter). (Tr. XIII at 1631-32; RX 44). However, there had been no discussions regarding exactly what status Complainant would have during his testimony. (Tr. XIII at 1640-41). Further, Ross had no knowledge regarding any conversations Complainant had with his supervisor in regard to his status at the time of the testimony. (Tr. XIII at 1646).

Testimony of Robert Thorlakson

Robert Thorlakson is a Human Resources Supervisor for the EPA in its Servicing Personnel Office. He provides human resources and original services to the Office of Water and the Office of Research and Development. (Tr. XIII at 1789).

In the summer of 1995, discussions were held regarding possible reductions in force in the EPA. To facilitate this, the office sent out a memorandum to each employee which contained an employment profile. The employees were asked to check these profiles for accuracy, correct them, and return them. (Tr. XIII at 1789-91). Almost fifty percent of these profiles were returned with some sort of error to correct. (Tr. XIII at 1792). A second profile was distributed to confirm that the proper corrections had been made. (Tr. XIII at 1794).

Complainant's profile still contained errors at the time the second profile was generated. However, Thorlakson believes that all of these were corrected and that Complainant's third profile was correct. (Tr. XIII at 1794-95). One of the changes that Complainant requested involved his title. The profile stated that he was a toxicologist; Complainant wanted that changed to senior science advisor. Thorlakson would not make that change, as "toxicologist" is the official personnel title for his job series while "senior science advisor" refers to the type of work performed. (Tr. XIII at 1797).

Testimony of Michael Hamlin

Michael Hamlin is the Senior Personnel Management Specialist in the Policy Division of the Human Resources Office of the EPA. (Tr. XIV at 1870-71). Hamlin has been in the human resources area for sixteen years. (Tr. XIV at 1871).

Hamlin testified to the appropriate uses of excused absences, as envisioned by the Code of Federal Regulations and the Office of Personnel Management manual. According to Hamlin, "there's a lot of leeway in what administrative leave or excused absences should be granted for" and basically, "[i]t's within the discretion of the supervisor" to grant

such leave. (Tr. XIV at 1873). The EPA's leave manual was revised in 1987, and the 1987 version, which is currently in effect, "tracks almost identically" the OPM manual and includes those provisions concerning supervisory leeway. (RX 33; Tr. XIV at 1874). The manual defines "Excused Absence" as "[a]n absence from duty administratively authorized without loss of pay and without charge to leave" and indicates that the term is synonymous with "administrative leave." (RX 33, at Chapter 9, 9-1 and Appendix, A-2.)

Testimony of Francis Bonds

Francis Bonds, a legal technician, works with the Office of General Counsel at the EPA as a legal technician. (Tr. XIV at 1903). Bonds handled the posting of the decision from the original claim. He was instructed that the decision should be posted for a period of thirty days, and he was to contact the proper people so as to have it posted. (Tr. XIV at 1904-05). Bonds typed on the front page that anyone who was interested could request a copy of the decision. Seventy-five copies were made and posted at various agency bulletin boards. (Tr. XIV at 1905). Bonds saw the decision posted and observed other employees asking for copies of the decision. (Tr. XIV at 1906).

Testimony of Severa Wilson

Severa Wilson is a Support Services Specialist for the facilities operations branch. One of her responsibilities at the time she started was "project officer for a contractor that handles our signage coordination." (Tr. XIV at 1910-1912). Anyone that wanted anything posted or any signs made had to talk to Wilson. (Tr. XIV at 1912).

Wilson spoke with Bonds regarding the posting of the decision from the original claim. She told him that they would need 75 copies to cover all of the bulletin boards. After she received the copies, she contacted her signage coordinator who posted the copies throughout the building. (Tr. XIV at 1912-1913). She also gave copies to the building managers of the branch offices for posting there. (Tr. XIV at 1915).

Testimony of Julie Street

Julie Street has served the government for over 25 years and now works as the Agency Benefits Officer for the EPA. (Tr. XV at 1938-39). As the benefits officer, Street deals with health benefits, life insurance, and retirement savings plans such as the Thrift Savings Plan ("TSP").[21] (Tr. XV at 1939).

[21] The TSP is "a voluntary plan in which our CSRS employees can contribute up to five percent of their biweekly salary, and other employees can contribute up to ten percent, as long as it doesn't exceed the IRS tax cap" of $9,500. (Tr. XV at 1939).

Street became involved in this matter when she began to determine what benefits were due to Complainant during his time of separation. The major issues developed over how to reinstate his TSP. (Tr. XV at 1940). Mainly, she was concerned about the effect of the number of opportunities to change his plan to more productive plans that Complainant would have missed during this time period. ***Id.*** Street attempted to assist Complainant with these elections by providing him the election forms and information regarding the performance of the various funds. (Tr. XV at 1941).

Street testified that Complainant contacted her after his reinstatement regarding information on his pay stub. Complainant was concerned that his pay stub only reflected the most recent TSP deductions and did not show his prior contributions. Street informed him that this was due to the "data dump" that had been initiated on his termination, and that, while they would be unable to get the pay stub to reflect the prior contributions, the money was still there. (Tr. XV at 1941-43). The total amount would be reflected on the TSP statements that are distributed twice a year.[22] (Tr. XV at 1943).

On June 7, 1995, Street received a letter from Complainant asking for her help on a variety of issues. (RX 47). Street was only able to help with those issues dealing specifically with benefits. (Tr. XV at 1946). She referred the remainder of the issues to people that she thought would be able to assist Complainant. (Tr. XV at 1962-63).

Once Complainant made his decisions regarding withholdings and contributions, he submitted the pertinent forms to Street. (Tr. XV at 1979; CX 144). Street then marked them with the appropriate effective dates and submitted them to the payroll office. (Tr. XV at 1981). Around May 31, 1995, Street received a letter from Complainant discussing his concern that the current TSP deductions had not yet begun. (CX 145). Street thus made an inquiry into this matter. (CX 146). After a few months, she made a follow-up inquiry and discovered that the problem had not been fully resolved. (Tr. XV at 1989). According to Street, the TSP problem arose because the amount invested is subject to the yearly IRS cap, regardless of whether the deductions are from back pay or current wages. (Tr. XV at 2010-11). She did not know what, if any, instruction was given as to the TSP deductions for the back pay, ***i.e.***, whether the National Finance Center was instructed to treat the deductions as if they were from 1995 and not 1996. (Tr. XV at 2036).

Testimony of Simon Miller

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[22] Complainant tried to argue that the amount must be listed on his pay stub in order for him to be made fully whole. However, Street testified that upon inquiry, it was determined that this cannot be done. (Tr. XV at 1975-76). Accordingly, I find that the TSP statements are sufficient for this purpose.

Simon Miller is Associate Regional Counsel with the EPA Region IV in Atlanta, Georgia. He has been an attorney for 8 years. In this position, Miller worked on a case known as "the Shaver's Farm case." Miller met Holtzclaw and worked with him as a result of that case. (Tr. XV at 2090).

Miller never asked Holtzclaw to retain an expert witness for the case. However, Holtzclaw mentioned that he might know of someone who could serve as an expert if necessary. Miller passed that information along to the attorney that was handling the case for the Department of Justice. Miller does not recall the name of the witness that Holtzclaw indicated he could provide. (Tr. XV at 2090-92).

Testimony of William Sanjour

William Sanjour was called by Complainant as a rebuttal witness. Sanjour is a policy analyst for the EPA in the Solid Waste Division. (Tr. XV at 2096-97). Sanjour has filed "several" claims against the EPA. (Tr. XV at 2098). He has been involved in two whistleblower cases involving the agency, along with various other actions.[23] (Tr. XV at 2098-100).

Sanjour testified that he had previously submitted letters to Congress. These letters did not contain official positions, yet he still submitted them on EPA letterhead. In fact, Sanjour was generally critical of the EPA in these letters. (Tr. XV at 2102-04; CX 127). He was never informed that he should put any disclaimer on these letters or that it was improper to use the letterhead in this fashion. (Tr. XV at 2105). Further, Sanjour testified as to several instances where he had used EPA letterhead to communicate his own opinion to inquirers. (Tr. XV at 2112-17; CX 129-133). Sanjour also testified that another EPA employee, Kate Jenkins, had been involved in using letterhead, but that the issue was disposed of in her claim against the EPA. (Tr. XV at 2121-27; CX 134-135). Sanjour testified that employees use letterhead when posting comments on the public docket, which are by their nature critical of the EPA's position. (Tr. XV at 2137-39; CX137-143).

Deposition Testimony of Michael Petruska

Michael Petruska works at the EPA and was involved in a prior whistleblower case against the agency (***Jenkins***, Case No. 1992-CAA-6). (Petruska September 17, 1996 Deposition, CX 149 at 4-5). At that time he was a branch chief involved in Dr. Jenkins' use of letterhead for testimony to Congress that did not necessarily represent the opinion of the agency. (CX 149 at 13-17, 26.) Petruska contacted the General Counsel's office to

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[23] Sanjour was represented by Complainant's counsel in all of these proceedings. (Tr. XV at 2099-100).

find out whether such use was permissible, because of his concerns that such use might cause confusion as to whether the communication reflected EPA policy. However, he received no firm answer from the General Counsel's office. (CX 149 at 14-21, 58-59.) Petruska indicated that he was not aware of any official EPA policy regarding the use of letterhead, apart from the general prohibition against use of public property for private use. However, he did temper this testimony with the comment that he had not looked into such a policy in the past five years. (CX 149 at 18-19, 22-23.) He testified that Dr. Jenkins was not disciplined for her use of letterhead in this manner because the rules were not clear cut enough. (CX 149 at 25-26).

Deposition Testimony of Donnell Nantkes[24]

Donnell Nantkes works in the Office of the General Counsel at the EPA. (Nantkes July 2, 1996 Deposition, RX 50A at 4). Further, Nantkes is the alternate agency ethics official. (RX 50A at 31). Nantkes was in the office of Jon Cannon, the General Counsel, on July 26, 1995, when Cannon received a telephone call from Robert Perciasepe. This phone call was in regard to Complainant, who was testifying before Congress at the time. Perciasepe expressed concern as to whether Complainant had clearly indicated that he was not representing the EPA with his testimony. (RX 50A at 6). Because of this concern, it was decided that the appropriate action would be to write a letter to the committee before which Complainant had testified and inform the committee of his exact status. (RX 50A at 7-8).

Nantkes' general impression that day regarding Complainant's leave status was that while he should not have been required to take annual leave, he certainly was not on official duty. (RX 50A at 12). Subsequently, Nantkes was involved in writing a response to the inquiry from Congressman Brewster (the Cannon letter, CX 71; RX 35). In preparing this response, Nantkes talked to Dr. Kuzmack and stated that "excused absence, administrative leave" was the best way to describe Complainant's leave status. (RX 50A at 16-17). As to Complainant's use of letterhead, it is Nantkes' opinion that since February 3, 1993, the ethics regulations provide "a much firmer basis for saying that there is a rule against use of government stationery for your personal activities." (RX 50A at 29). He feels that an EPA employee may only use agency letterhead for official purposes, due to the prohibition against using government property for private purposes. (RX 50A at 27).

[24] Two depositions of Nantkes were submitted into the record. The first deposition was taken on July 2, 1996, and incorrectly refers to Nantkes as "Donald Mantkes." This deposition has been admitted into evidence as RX 50A The second deposition was taken on November 5, 1996 and has been admitted into evidence as RX 50B.

Nantkes stated that he thought the EPA's prior decision to terminate Complainant was correct. (RX 50A at 10). However, he did not discuss that opinion with either Cannon or Perciasepe. (RX 50A at 14). Nantkes also stated that it might be appropriate to discipline Complainant for his actions relating to his testimony in the Waco matter. (RX 50A at 42).

Deposition Testimony of Jonathan Cannon

Jonathan Cannon is currently the General Counsel for the EPA. (Cannon July 15, 1996 Deposition, RX 51 at 4). Cannon did not recall ever having seen the orders in the previous case. (RX 51 at 12).

Cannon stated that he became aware of Complainant's testimony at the Waco hearing when he was advised about Chairman Brewster's Congressional inquiry as to Complainant's status. He remembered discussing the response with Robert Perciasepe and helping Perciasepe draft the initial response (the Perciasepe letter). (RX 51 at 24-25). He does not recall discussing Complainant's prior claim at that time. (RX 51 at 27). He understood from Perciasepe that Complainant was not representing the EPA with his testimony and was not authorized to do so, and he assisted in drafting the response accordingly. (RX 51 at 27-30). He did not do any follow up as to the letter. (RX 51 at 30). Some time later, he became aware that the Inspector General's Office was investigating this incident. (RX 51 at 31).

Subsequently, a letter from Congressman Brewster was referred to him for a response. (RX 51 at 32-33). He received a draft of the November 1, 1995 response (the Cannon letter), and, although he did not consult with anyone from the Office of Water, he asked his staff to do so. (RX 51 at 34-36). The draft was prepared primarily by Nantkes. (RX 51 at 36).

DISCUSSION

Applicable Law

As discussed above, the instant case has been brought under the employee protection provisions of the Six Acts. These "whistleblower" provisions are designed to "protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of one of these federal statutes." ***Devereux v. Wyoming Association of Rural Water***, 93-ERA-18 (Sec'y, October 1, 1993). ***See also*** 29 C.F.R. § 24.2. The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. ***See Tyndall v. U.S. Environmental Protection Agency***, 93-CAA-6, 95-CAA-5 (Administrative Review Board, June 14, 1996).

The employee protection provision in the Clean Air Act ("CAA") provides, in relevant part:

> (a) Discharge or discrimination prohibited
>
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration of enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. § 7622. Almost identical wording appears in this provision's counterparts in the Safe Drinking Water Act, 42 U.S.C. § 300j-9 ("SDWA") and the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"). A similar provision appears in the Solid Waste Disposal Act, 42 U.S.C. § 6971 ("SWDA"); the Water Pollution Control Act (or Clean Water Act), 33 U.S.C. § 1367 ("WPCA"); and the Superfund law, 42 U.S.C. § 9610 ("CERCLA").

The Secretary of Labor has found that the provisions of all of these statutes except for the TSCA are applicable to the EPA.[25] ***See Jenkins v. United States Environmental Protection Agency,*** 92-CAA-6 (Sec'y, May 18, 1994) at 2 -6. Specifically, the Secretary has noted that the definition of "person" under CERCLA, the SDWA, and the CAA is broad enough to include the EPA, and that the SWDA and the WPCA can be construed as waiving immunity generally. ***Id.***

Jurisdiction

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[25] In that case, the Secretary did not reach the issue of the applicability of the TSCA because the remaining statutes provided "a full measure of relief." ***Jenkins v. United States Environmental Protection Agency,*** 92-CAA-6 (Sec'y, May 18, 1994) at 5.

Before reaching the merits of these consolidated cases, I must first determine whether this Office has the jurisdiction over the complaints. The EPA contends that the current complaints constitute enforcement actions; therefore, the complaints should be dismissed as improperly before this Office. Complainant contends that I have jurisdiction over the complaints on two separate bases: First, any adverse action is a new and separate violation of the environmental acts, ***i.e.***, the actions are in retaliation for the filing of the first suit. Second, Complainant contends that this Office has enforcement jurisdiction over the prior decision and order.

As no regulation currently exists regarding to this issue, I must look to the individual acts to determine my authority to hear an enforcement action.[26] Three of the Six Acts -- the CAA, the SDWA, and the TSCA -- state that actions to enforce an order issued under them must be brought in the United States District Court for the district in which the violation was found to occur," while the remaining statutes are silent (at least in the specific employee protection provision) as to the enforcement mechanism. ***Compare*** 42 U.S.C. § 7622(d), 42 U.S.C. § 300j-9(i)(4), and 15 U.S.C. § 2622(d) ***with*** 42 U.S.C. § 9610(b), 42 U.S.C. § 6971(b), and 33 U.S.C. § 1367(b). In a case involving the ERA, which has similar language to the CAA, SDWA and TSCA, the Tenth Circuit held that the statutory language is clear that the ministerial task of enforcing a decision and order in these cases has been given to the District Court. ***Kansas Gas & Elec. Co. v. Brock,*** 780 F.2d 1505, 1514-15 (10th Cir. 1985), ***cert. denied,*** 478 U.S. 1011 (1986). The Third Circuit agreed with this rationale, holding that the Secretary does not have the authority to enforce decisions and orders in these types of cases. ***Williams v. Metzler***, 132 F.3d 937 (3d Cir. 1997).

Judge Clarke's Recommended Decision and Order failed to specify which of the Six Acts had been violated. In the Secretary's Decision and Order at p. 3, footnote 1, the Secretary found jurisdiction over the EPA under express provisions in CERCLA and the SDWA. "Because the CERCLA and the SDWA afford Dr. Marcus a full measure of relief," the Secretary did not find it necessary to "discuss coverage under the remaining environmental whistleblower statutes." ***But cf. Jenkins, supra*** (finding jurisdiction over EPA except with respect to TSCA.) As three of the Acts, including the SDWA, specifically

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[26] The prior version of 29 C.F.R. § 29.8 stated expressly that an action for enforcement of any order in cases involving the Six Acts was to be brought before a United States District Court, but the version of the regulations effective March 8, 1998 does not contain such a provision. The entire section relating to "Enforcement proceedings" and the entire section relating to "Judicial review" have been removed, according to the preamble for both the proposed rule and the final rule, because "[t]hese provisions vary from statute to statute among the whistleblower programs" and "the types of judicial review or enforcement actions which are available does not need to be the subject of rulemaking since they are prescribed by statute and concern judicial remedies." 59 Fed. Reg. 12506 (March 16, 1994); 63 Fed. Reg. 6614 (Feb. 9, 1998).

require Federal District Court enforcement, I am reluctant to reach the conclusion that I can enforce the decisions and orders even assuming, ***arguendo***, that I would have enforcement authority to the extent that the decisions and orders are governed by the remaining three statutes (including CERCLA).[27] Such a determination could result in parallel proceedings going on in District Court and before an administrative law judge relating to the exact same provisions to be enforced. Accordingly, I conclude that jurisdiction over the enforcement of the decisions and orders in the instant case exclusively lies in Federal District Court.

Despite my lack of jurisdiction over enforcement proceedings, I agree with Complainant's contention that the allegations in the instant case also set forth new (and continuing) causes of action, in that Complainant alleges adverse actions taken as a result of Complainant's participation in his initial whistleblower suit. Such new causes of action would be available under the Six Acts even if the Complainant had not prevailed in any way in the prior case, provided that the retaliatory actions were taken against him as a result of his participation in the prior proceedings. Accordingly, I will consider the following allegations only to the extent that they allege new adverse actions under the Six Acts based upon EPA's retaliation for Complainant's participation in the prior suit.

Elements of Prima Facie case

"The burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1964." ***Odom v. Anchor Lithkemko***, 1996-WPC-1 (Administrative Review Board Oct. 10, 1997).[28] Accordingly, to establish a prima facie case of a violation of the CAA's employee protection provision, a complainant must show that he (or she) engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him, and he must raise the inference that the protected activity was the likely reason for the respondent's adverse action against him. ***Tyndall v. U.S. Environmental Protection Agency***, 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996); ***Jackson v. The Comfort Inn, Downtown***, 1993-CAA-7 (Sec'y, March 16, 1995).

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[27] In addition, I note with respect to CERCLA that the "Employee protection" provision provides that the order issued by the Secretary of Labor is "subject to judicial review in the same manner as orders and decisions are subject to judicial review under this chapter," 42 U.S.C. § 9610(b), and the section relating to "Civil proceedings" provides (with exceptions not relevant here) that "the United States district courts shall have exclusive jurisdiction over all controversies arising under this chapter." 42 U.S.C. § 9613(b). (The chapter referenced is Chapter 103, of which the "Employee protection" provision is a part.)

[28] Case citations herein have been adapted to conform with the Year 2000 format.

Once an employee has established a ***prima facie*** case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. In this regard, the complainant always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the respondent's actions. ***Jackson, supra***. Once the employee has shown that illegal motives played some part in the discharge (or other adverse action), the employer must prove that it would have taken the same actions in regards to the employee even if he had not engaged in protected conduct. In such "dual motive" cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. U.S. Department of Labor***, 940 F.2d 1287 (9th Cir. 1991).

1. Protected Activity

The first element of the prima facie case has been satisfied. Complainant has established that he engaged in protected activity; the protected activity in this matter is Complainant's previous whistleblower suit against the EPA. As such a suit is "a proceeding under this chapter or a proceeding for the administration of enforcement of any requirement imposed under this chapter," such a suit is expressly included as a protected activity under the Clean Air Act. 42 U.S.C. § 7622(a)(1). There are similar provisions in the other Six Acts. As the prior proceeding involved all Six Acts, the protected activity also involves all Six Acts.

2. Respondent aware of protected activity

The second element has also been satisfied. As the EPA was the respondent in the first suit, it is axiomatic that it was aware of this protected activity. Further, as the EPA was required by the original decision to post copies of the original decision, it cannot assert that it was unaware of the protected activity.

3. Adverse action

With respect to the third element, the CAA describes the prohibited activities in terms of discharging or otherwise discriminating against employees with respect to compensation, terms, conditions, or privileges of employment, all of which may be characterized as adverse actions. Similar provisions appear in two of the other Six Acts, while the remaining three proscribe discharging or otherwise discriminating. An "adverse action" has been defined as "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." ***Stone & Webster Engineering Corp. v. Herman***, 115 F.3d 1568, 1573 (11th Cir. 1997) (defining adverse action in the

context of an Energy Reorganization Act case). Under 29 C.F.R. § 24.2(b), as amended, an employer is deemed to have violated the particular statutes and regulations "if such employer intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee" because of protected activities.

Complainant alleged several adverse actions in his complaint, some of which are cognizable under the Six Acts as new adverse actions resulting from EPA's retaliation for his participation in the prior suit, while others relate to the enforcement of the decisions and orders issued in the prior case. The alleged adverse actions are discussed sequentially below.

4. Inference that such action is in part due to protected activity

The final element in the ***prima facie*** case requires Complainant to produce enough evidence to raise the **inference** that the motivation for the adverse action was his protected activity. The inference may be raised by temporal proximity between the whistleblowing activities and the adverse actions. ***Tyndall v. U.S. Environmental Protection Agency,*** 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), ***citing Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989). ***See also Simon v. Simmons Foods, Inc.***, 49 F.3d 386, 389 (8th Cir. 1995). If the Complainant establishes that he received disparate treatment -- ***i.e.,*** that he was subjected to adverse action not provided to similarly situated employees who did not engage in whistleblowing activities -- he will have raised such an inference. ***See*** 29 C.F.R. § 24.2.

This issue is interrelated with the adverse actions alleged and will be discussed along with each such adverse action alleged.

Specific Allegations of Adverse Actions

1. Orally communicating negative information about Complainant and negatively commenting on his protected activities ("Bad mouthing").

During the hearing, evidence was presented dealing with two episodes of so-called bad mouthing: (1) the comments made by Dr. Kuzmack to Brian Holtzclaw concerning Complainant's potential as an expert witness for EPA and (2) the negative references EPA managers gave to Michael Rankin of Documented Reference Check ("DRC") concerning Complainant's employment at EPA.

With respect to the first category of "bad mouthing," Holtzclaw and Dr. Kuzmack have different recollections as to the exact tenor of the conversation between them. Holtzclaw insists that Dr. Kuzmack was insistently questioning him as to his need for

Complainant's number. In fact, Holtzclaw's notes indicate that Dr. Kuzmack stated, "Aren't you aware that the EPA tried to fire [Complainant] and they did not succeed? Aren't you aware that he argued against fluoridation?" (CX 15; CX 16). Dr. Kusmack doesn't recall the conversation being that confrontational. However, he did admit that he mentioned Complainant's past history with the EPA and that Complainant had been involved with a report on fluoride. (Tr. III at 505-15). Dr. Kuzmack's rationale was that he needed to protect the agency in any matter where an employee may be speaking on its behalf. (Tr. III at 652).

The second category of "bad mouthing" alleged in this complaint is even more blatant. As discussed above, after Complainant was informed of the conversation between Holtzclaw and Dr. Kuzmack, he hired Mike Rankin of Documented Reference Check (DRC) to discover the extent of the bad mouthing. (CX 14). In conducting this check, several comments were made by the people who were asked to provide references. These comments were transcribed contemporaneously. (Tr. V at 347-48; 352). Dr. Davies stated "[Complainant] takes his own opinion outside, and represented his position as somewhat as the agency's opinion, and we are not in concurrence on his position with fluoride." (CX 14 at 4). Margaret Stasikowski stated "this will be a problem" when questioned. When asked who could provide information concerning Complainant, Stasikowski became flustered and mentioned the General Counsel's office as Complainant had been a "very difficult personnel issue for quite a long period of time" and that "there was litigation between the agency and [Complainant] and the agency lost." (CX 14 at 4-5). At the hearing, Dr. Davies and Staskikowski did not deny making these statements; they merely indicated that while they discussed such matters, they could not confirm the exact content of the conversation. (Tr. I at 81-82; Tr. VII at 686-90 & 710-12).

Based on a broad definition of adverse actions, these statements by EPA officials would constitute prohibited adverse actions against Complainant, and are thus new violations of the whistleblower protection provisions. Further, a review of the case law supports this decision.

The Secretary has held that an employer commits a prohibited adverse action against an employee when it references the employee's complaint regarding discrimination when providing information regarding that person's employment. ***Gaballa v. Arizona Public Service Co. and The Atlantic Group***, 1994-ERA-9 (Sec'y Jan.18, 1996). ***See Odom v. Anchor Lithkemko***, 1996-WPC-1 (Administrative Review Board Oct. 10, 1997) (citing ***Gaballa*** for the proposition that a negative recommendation is an adverse action where the employer explicitly mentions "the employee's protected complaint of retaliation). Further, the Secretary has explicitly approved a finding of an adverse action where the person to whom the negative recommendation was supplied was from Documented Reference Check, and thus was someone who was not seeking to actually hire or interview the employee. ***Leveille v. New York Air Nat'l Guard***, 1994-TSC-3 (Sec'y Dec. 11, 1995).

Considering the case law and the statutes, I find that the above listed episodes of "bad mouthing" Complainant were adverse actions.

The statements that comprise the "bad mouthing" allegations expressly refer to Complainant's protected activity. As such, I find that Complainant has raised the inference that the motive for this adverse action was his protected activity. Complainant has therefore established a ***prima facie*** case of discrimination in regard to the "bad mouthing" allegations.

2. Failure to properly post and circulate the reinstatement order or other decisions and orders issued in Complainant's case.

This allegation of the initial complaint does not allege any cognizable cause of action. The substance of this allegation merely requests enforcement of the order in the prior case. As such, I do not have jurisdiction over this allegation of the complaint. ***See Jurisdiction, supra*.**

3. Failure to adequately train EPA employees and managers, so that Complainant and other whistleblowers can obtain fair treatment and be restored to the full terms and conditions of employment.

Apart from its interrelationship with some of the other allegations, such as that relating to "bad mouthing", this allegation of the complaint does not allege a separate, cognizable cause of action. To the extent that this allegation of the complaint may be deemed to request enforcement of the order in the prior case, I have found that I do not have jurisdiction over it. ***See Jurisdiction, supra*.**

4. Failure to restore Complainant to all of the privileges of employment, and specifically failure to authorize or assign travel and attendance at meetings and conferences in a manner consistent with the order of the Secretary of Labor, failure to assign him work consistent with his job description, and failure to otherwise allow him to perform as a Senior Science Advisor ("Isolation").

Aspects of this group of allegations include a request for enforcement, to the extent that they relate to whether the Complainant was treated in a manner consistent with the Secretary's decision and order in the previous claim, and I have found that I lack jurisdiction to enforce the prior decisions and orders. However, this group of allegations also comprises an allegation in regard to additional adverse actions resulting from Complainant's filing of and participation in the original suit, as essentially Complainant has taken the position that he has become isolated and has received no meaningful work

assignments or opportunities for professional development as a result of his status as a former whistleblower. I have jurisdiction and will consider this allegation to the extent that it encompasses such complaints of "isolation."

One basis for this "isolation" allegation is that since his reinstatement, Complainant has not been assigned any projects that would allow his attendance at conferences and meetings. Complainant explicitly testified that such attendance is necessary in order for him to fully function and enjoy all the privileges of employment as a Senior Science Advisor. The EPA responded that the travel budget was limited during this period and that most of the conferences and meetings listed by Complainant were better suited to others within the agency. Further, the EPA insisted that Complainant did not request to attend many of these meetings.

Also included within this "isolation" allegation are the EPA's methods of handling Complainant's mail and phone calls, the lack of assignments consistent with his position description and the fact that no one seeks Complainant for technical advice within the agency. EPA has attributed these problems primarily to Complainant's home duty station.

Some of these allegations are insufficient to reflect disparate treatment or rise to the level of an adverse action. Specifically, Complainant did not produce enough evidence regarding the delivery of his mail to indicate that it was an adverse action. Nor did Complainant produce enough evidence to show that the failure of people to seek his advice within the agency reflects disparate treatment, outside of the side effects of his limited travel and attendance at meetings and the interception of his telephone calls. Moreover, Complainant did not provide enough evidence to indicate that the failure to provide "interesting" or meaningful assignments was the result of disparate treatment so as to constitute an adverse action, except, possibly, with respect to meetings and conferences and the interception of his phone messages.[29] However, when taken together, these allegations do provide further support for Complainant's "isolation" claim.

Complainant's lack of attendance at meetings and conferences, the treatment of his phone messages, and the general isolation that has seemed to result, requires further inspection. In this regard, it is troubling that Dr. Davies' testimony reflects uncertainty as to Complainant's role in the office. It is also troubling that Dr. Kuzmack, who is in the same

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[29] As indicated ***supra***, Complainant supplied a laundry list of assignments that he would like to have. However, Complainant acknowledged that he has been receiving some job assignments consistent with his position and he supplied no evidence that the decisions to assign him to some assignments instead of others was in any fashion an adverse action. To the extent that the assignment of projects has resulted in lackluster travel and conference attendance, this allegation is included ***infra.***

type of position (senior science adviser) as the Complainant, obviously has far more significant responsibilities.

According to Complainant's testimony, prior to his termination, he was allowed to attend conferences and office meetings. In fact, Complainant testified that such attendance was essential to his position so that he could stay informed on the current state of scientific knowledge. Since his return, his travel has been limited, if not nonexistent, as has been his attendance at office meetings.

It is true that Complainant is not the only Senior Science Advisor within his division, and that Dr. Kuzmack is his supervisor. However, even when Dr. Kuzmack is away, Complainant is not asked to attend in his place. Granted, Complainant may not have specifically requested that he be permitted to attend any of these conferences and meetings, but the record does not indicate that Complainant was ever required to make such a request prior to his termination.

The manner in which EPA has handled Complainant's phone messages is also troublesome. Although the difficulties result in part from Complainant's assignment to a home duty station because of his allergies, the fact remains that his phone messages are routinely intercepted by Dr. Kuzmack, who then decides whether they will be referred to someone else instead of the Complainant. This procedure has the effect of isolating the Complainant.

The Secretary has held that evidence that a new job is less prestigious than the one held prior to the protected activity can establish an adverse action, as can testimony that the complainant was to remain "invisible" by not signing his name to reports. ***DeFord v. Secretary of Labor***, 700 F.2d 281, 287 (6th Cir. 1983). In the present case, Complainant presented a veritable wish list of conferences, programs, presentations and office meetings that he could have attended. Moreover, Complainant showed that no effort was made to integrate him into the office, as with the use of a voice mail system or distribution of written materials. While I do not find that Complainant should have necessarily been allowed to attend all of the events, the lack of attendance at any is suspicious, as is the failure to forward Complainant's phone messages to him. Here, the actions of the EPA have effectively isolated Complainant from the rest of the agency and prevented him from obtaining all of the privileges of employment. Accordingly, the failure to allow Complainant to attend conferences and meetings or to integrate him into the office does equate to an adverse action.

When an adverse action follows in close proximity to a protected activity, that alone is sufficient to create the inference that the motive for the adverse action was the complainant's protected activity. ***Scerbo v. Consolidated Edison Co. of New York, Inc.***, 1989-CAA-2 (Sec'y Nov. 13, 1992). The failure to allocate travel to Complainant began

as soon as he was reinstated as a result of his protected activity, and continued to the time of the hearing. The screening of Complainant's telephone calls and mail also postdated the protected activity and continued. I find that the temporal proximity of the adverse actions to Complainant's protected activity is sufficient to raise the necessary inference. Accordingly, Complainant has established a ***prima facie*** case in regard to the lack of travel and attendance at meetings and isolation aspect of his complaint.

5. Failure to make Complainant "whole" in terms of his Thrift Savings Plan and Other Fringe Benefits.

This allegation of the initial complaint appears to related solely to a request for enforcement of the order in the prior case. As such, I have found that I do not have jurisdiction over it. ***See Jurisdiction, supra*.**

6. Filing of a false and derogatory letter to the U.S. Congress concerning Complainant's testimony during special hearings on the Waco incident and instituting an investigation thereof.

The final allegation involved in these actions, raised in the second complaint, is that the EPA committed an adverse action by responding to the Congressional inquiry as to Complainant's status regarding his testimony in such a manner as to indicate that he had lied and by instituting an Inspector General investigation into his testimony.

The letter that forms the basis for this allegation (the "Cannon letter") was sent on November 1, 1995, in response to an inquiry from a representative from the Committee before which Complainant had testified. As noted above, Complainant stated at the hearing that he was appearing for the EPA and was being paid by the EPA to give his testimony, and only later stated that the views expressed were his own. Complainant had also submitted a written copy of his testimony on letterhead, and the written testimony did not indicate that the views presented were not the official agency views. These actions apparently caused confusion amongst the Committee members as to Complainant's exact status.

Complainant contends that the Cannon letter, and specifically its discussion of the leave and letterhead issues, constitutes another adverse action in the present claim. As to Complainant's use of letterhead, the letter states that Complainant's use "appears to contravene" the standard of not implying that a person's actions are that of the agency. (CX 71 at 1). The letter further states that his use of EPA letterhead seems to violate the agency standard concerning the use of office supplies for other than authorized purposes, as well as general prohibitions regarding the use of Federal Government property. (CX 71 at 2). As to Complainant's work status, the letter states that Complainant was on an

excused absence. (CX 71 at 3). Complainant alleges that this letter is a blatant fabrication with the purpose of deriding Complainant to Congress.

While the letter is not false and derogatory to the extent that Complainant alleges, the text was written in a manner suggesting that Complainant was culpable in his testimony before the Committee and may even have been guilty of misconduct. Such assertions appear to go far beyond the clarification required by the Committee. As such, the sending of the Cannon letter (and its inclusion of gratuitous criticism of Complainant) constitutes an "unpleasant" event which meets the definition of an adverse action. Further, Complainant has produced enough evidence so that the inference can be drawn that this action was in part the result of his protected activity. The testimony of Donnell Nantkes, who was primarily responsible for drafting the Cannon letter, indicates that he knew of the prior suit and reveals his opinion that the agency was correct in terminating Complainant. Moreover, his testimony reflects his negative opinion of Complainant. Such evidence is enough to raise the inference that Nantkes may have written this response on the basis of his personal feelings towards Complainant. Accordingly, Complainant has established a ***prima facie*** case regarding the letter of explanation signed by Cannon.

As a final matter, I find that the Complainant has not established a ***prima facie*** case regarding the Inspector General investigation itself. Although the investigation would appear to constitute an adverse action, no basis has been shown for drawing the inference that the investigation was in any way motivated by the Complainant's protected activity. Rather, it appears that the investigation was an appropriate response given the confusion caused in part by Complainant's failure to make his status at the hearing clear.

Nondiscriminatory reasons for actions

As discussed above, Complainant has shown that the EPA committed adverse actions against him (by "bad mouthing" him, by effectively isolating him from the rest of the agency, and by writing a letter to Congress disparaging Complainant), thereby shifting the burden of production to the EPA. To satisfy this burden, EPA must prove that it had legitimate, nondiscriminatory reasons for its action. ***See Bausemer v. TU Electric,*** 1991-ERA-20 (Sec'y Oct. 31, 1995), ***citing Kahn v. United States Secretary of Labor,*** 64 F.3d 271, 278 (7th Cir. 1995).

In the present case, the EPA did not rebut Complainant's evidence of "bad mouthing." The EPA tried to rely on the testimony of the alleged "bad mouthers" to prove that the accounts by Holtzclaw and Rankin were inaccurate. However, the rebuttal testimony merely indicates that the "bad mouthers" (Dr. Tudor Davies, Dr. Arnold Kuzmack and Margaret Stasikowski) could not remember the exact content of the conversations, which they admitted took place. They expressly could not testify with any certainty that they did not make any of the statements attributed to them and did not offer any possible

justification. As a result, the EPA has failed to produce any nondiscriminatory reason for this action, and Complainant has proven his complaint in respect to this allegation.

As to the isolation allegations, the EPA did produce evidence of nondiscriminatory reasons for the alleged adverse actions. First, with respect to the travel allegations, the EPA introduced evidence regarding the financial state of the EPA during the relevant time period. According to this documentation, the EPA was experiencing financial difficulty. Thus, travel would be limited. Further, the EPA presented evidence that Complainant was not assigned to the topics being presented at many of the conferences and meetings on his "wish" list. He failed to request that he be allowed to participate in other conferences, and testimony revealed that Complainant did not even attend one meeting due to his concern about availability of parking. Evidence at the hearing also indicated that the isolation Complainant is experiencing is partly attributable to the fact that Complainant works from his home. Many of the pertinent meetings take place within the EPA's building, and Complainant's inability to spend much time in the building has, to some extent, prevented his attendance. Moreover, EPA argued that Complainant's home duty station prevented him from receiving his phone messages, being placed on the voice mail system, or otherwise participating in office functions. Obviously, if the Complainant were working in the EPA building, he would not have been isolated in this manner. EPA also noted that Complainant did not suggest that information be routed to him in some other manner due to his home location. Accordingly, I find that the EPA has suggested nondiscriminatory reasons and has met its burden of production with respect to the isolation allegations.

Finally, as to the allegedly derogatory Cannon letter, the EPA presented the employees who were involved in the drafting of this letter. Only one of these employees was directly involved in the prior litigation, Donnell Nantkes. As noted above, Nantes did state in his testimony that he thought Complainant should have been terminated for his prior activities. However, he also testified that the letter correctly states the proper use of letterhead within the EPA, and the letter was approved of, and signed by, the General Counsel. While the gratuitous comments concerning the appropriateness of the Complainant's actions may have been unnecessary, they were nevertheless consistent with the assignment of the letter preparation to the General Counsel and the purpose of clarifying the pertinent law and regulations for the inquiring Congressman. Therefore, the EPA has met its burden of production in regard to this adverse action as well.

Pretext for Retaliation

To the extent that the EPA has produced evidence of nondiscriminatory motives behind the adverse actions, the burden shifts back to Complainant to demonstrate for each that the articulated reason is merely a pretext and that the action was based on a discriminatory motive. ***See Zinn v. University of Missouri***, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996); ***Scerbo v. Consolidated Edison Co. of New York, Inc.,*** 1989-CAA-2

(Sec'y Nov. 13, 1992). Complainant "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ***Texas Dep't of Community Affairs v. Burdine****,* 450 U.S. 248, 256 (1981) (Title VII case) (citation omitted). ***See also Nichols v. Bechtel Construction, Inc.,*** 1987-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 13.

The EPA was not able to rebut the ***prima facie*** case regarding the "bad mouthing" allegation, and I find that Complainant has proven that this adverse action was taken as a result of his participation in his prior whistleblowing suit. To prevail on the remaining allegations, Complainant must prove by a preponderance of the evidence that the EPA had a discriminatory motive in effectively isolating Complainant with respect to travel and phone messages, as well as in drafting its response to the Congressional inquiry regarding his Waco testimony.

The "isolation" allegation has numerous components. Complainant testified that he was not given the same amount of "interesting" assignments and was not being made available to assist others in the EPA. Complainant was not asked to attend meetings or conferences. His telephone calls and mail were screened. The underlying theme of this allegation is that Complainant was, in effect, relegated to a position of seclusion with his only liaison being Dr. Kuzmack and that this isolation was the result of his previous whistleblower claim.

The EPA has relied on numerous reasons to explain Complainant's isolation. These explanations include: There was a reduction in travel funds due to budgetary shortages (which limited travel funds to persons directly involved in specific projects); Complainant was unable to work in the main EPA building due to health problems (which prevented his inclusion in the telephone or voice mail system); Complainant evidenced a lack of desire to attend meetings (as reflected by his failure to attend some of those suggested to him); Complainant failed to make specific requests (such as requesting that the EPA keep him informed of things relevant to his position); and Complainant's attendance at meetings and conferences would be unnecessary and duplicative (as these duties were already attended to by Dr. Kuzmack). Essentially, EPA's defenses to his isolation are premised in large part upon the isolation itself, combined with the notion that he was essentially an unnecessary employee, as the real senior science adviser position was held by Dr. Kuzmack.

In essence, these defenses by EPA provide some support for Complainant's assertions of disparate treatment and adverse action. In this regard, if Complainant's isolation were confined to any single component of the overall isolation of Complainant, such as reduction in travel, failure to implement a specific policy regarding mail and telephone inquiries, failure to properly route conference announcements, or failure to

request attendance at staff meetings, these excuses of the EPA might seem credible. However, all of these actions together demonstrate a pattern of conduct, the motive of which could only be to completely isolate Complainant from the rest of the agency. Such a conclusion is further bolstered by Complainant's testimony, which I find credible, that none of these factors were problems prior to his termination and reassignment. It is obvious that the EPA has pigeonholed Complainant in a meaningless position where his actions can be closely monitored.

With respect to the travel allegations, it is quite evident that the agency had a budget shortage and, as a result, cut back on the amount of travel. However, this was only for a limited period, and does not fully address the reasons for failing to allow Complainant to attend meetings and to fully inform him of the actions of the agency. Other employees who had more meaningful work assignments, including Dr. Kuzmack, had travel approved during the same period. A mere lack of funds cannot fully explain EPA's treatment of Complainant.

With respect to the phone messages, there is evidence that not only was Complainant not placed on the voice mail system, but Dr. Kuzmack actually intercepted Complainant's phone messages. In an least one instance, Dr. Kuzmack interrogated the caller as to why he wanted to get in touch with Complainant because of a perceived need to protect the agency. EPA has neither produced evidence showing that screening of telephone calls was routine for persons who worked at home nor provided any cogent explanation for the fact that Complainant's phone messages were not directly referred to him.

Here, the evidence suggests that Complainant was placed in his current position to keep him from causing any more trouble. The Secretary has found that an employer's nondiscriminatory reasons for the conduct were a pretext where the effect was to remove a complainant from the area where the whistle would most likely be blown. ***Scerbo v. Consolidated Edison Co. of New York, Inc.,*** 1989-CAA-2 (Sec'y Nov. 13, 1992). In the instant case as well, I find that the EPA's purported nondiscriminatory reasons for its actions were a pretext. Accordingly, I find that Complainant has proven his case in regard to the allegation that the actions of the EPA have effectively isolated him and kept him from performing his position as a result of his protected activity.

As to the Cannon letter to Congress, however, Complainant has not met this burden. Complainant has failed to show that the explanations offered by EPA concerning the letter's discussion of his use of EPA letterhead or his leave status were mere pretexts.

As to the language regarding the use of letterhead, the Cannon letter does suggest Complainant's actions were inappropriate and even violative of both EPA and Government-wide standards, and indicates he had been counselled concerning his

actions. Specifically, the letter stated that Complainant's use of letterhead "appears to contravene" the standard of not implying that a person's actions are that of the agency and that his use of EPA letterhead seems to violate the standard of using office supplies for other than authorized purposes. (CX 71 at 1-2). The letter goes on to say that "the Office of Water is developing guidance further clarifying" this issue "[i]n order to prevent future occurrences of this type of problem." (CX 71 at 2). This statement clearly indicates an admission that the EPA's policy regarding the use of letterhead is unclear. The letter goes on to indicate that his supervisors would have instructed Complainant not to use the letterhead if they had known his intention, and that Complainant's supervisor had "counselled him regarding the appropriate use of EPA property." (CX 71 at 1-2). While these statements about Complainant are clearly negative, a review of the report and testimony indicates that Complainant himself was primarily responsible for the confusion concerning his status at the time he gave his testimony, and his initial testimony is even somewhat misleading. Although his status was clarified during his later questioning by Committee members as well as by the initial letter sent from EPA (the Perciasepe letter), a further response was requested. A more detailed clarification by the General Counsel was clearly warranted in view of the confusion of Committee members to which Complainant himself contributed. It also appears that EPA was placed on the defensive by the need to further clarify the status of Complainant's testimony as well as by its own unclear policies. Further, Nantkes' testimony that the letter correctly states his view of the proper use of letterhead within the agency, combined with the participation of other EPA employees in drafting the letter, lends credence to the idea that the drafting of this letter was done for a proper purpose.

As to Complainant's leave status, despite its pejorative tone, the letter accurately states Complainant's leave status at the hearing. Dr. Kuzmack, while not expressly stating that Complainant would be on an excused absence, did tell him to state that he was not testifying on behalf of the agency. The letter so states. The letter does not expressly contradict Complainant's statements at the hearing regarding his status. It merely puts Complainant's status into its official nomenclature, an "excused absence" (also known as "administrative leave.") The term "excused absence" merely indicates that Complainant was given permission to be away from his normal duties without taking leave, as is reflected by the agency leave manual. In his brief, Complainant tries to allege that since the Inspector General's Office concluded that he was on normal duty hours during his testimony, the statement that he was granted an excused absence is false. I disagree. The statement that he was on an excused absence does not challenge the overall idea that Complainant was in official pay status nor does it "directly contradict" a statement that he was being paid by the EPA for his time before Congress. This was born out by Agent Gaddy's testimony that the letter was not totally in conflict with Complainant's testimony and essentially there was no practical distinction. It is true that the letter could have been worded differently so as to completely rule out any possible construction that would lead a person to believe that Complainant's statements before Congress were inaccurate.

However, Complainant's own difficulty in describing his pay status to Congress in a clear manner as well as Dr. Kuzmack's failure to clarify the matter in advance contributed to the confusion regarding this area, necessitating some clarification.

In view of the above, Complainant has failed to satisfy his burden of proof with respect to the Cannon letter. While Nantkes admittedly believed that Complainant should have been terminated for his previous conduct, Complainant has simply not proven by a preponderance of the evidence that this was the animus behind the drafting of this letter, as the actions Complainant took at the hearing in and of themselves provided adequate motivation. As the ultimate burden of proof lies with Complainant, this aspect of the claim must fail.

Conclusion

For the reasons set forth above, I find that Complainant has satisfied his ultimate burden of persuasion and has proven that the EPA took adverse action against him based upon his protected activities in regard to the "bad mouthing" allegation and those allegations that deal with his effective isolation within the EPA. Further, I find that EPA's justification for these actions is a mere pretext and Complainant has satisfied his ultimate burden of persuasion. Accordingly, Complainant is entitled to relief.

Damages / Relief

In the initial and amended complaints in Case No. 1996-CAA-03 and the complaint in Case No. 1996-CAA-07, Complainant sought the following relief: compensatory damages (including damages for emotional distress and loss of reputation) in an unspecified amount; affirmative relief (including posting of the Wage and Hour decision); proper reinstatement as a senior science advisor; prohibition against certain activities by EPA (including "bad mouthing"); attorney fees and costs; punitive and exemplary damages in an unspecified amount; and any other appropriate relief. In his brief, Complainant also suggests that the affirmative relief be agreed upon by the parties or specified in a detailed order and seeks oversight ("enforcement jurisdiction") by the undersigned until all parties stipulate that the requested relief has been met.[30]

1. Compensatory damages

In the previous action, Complainant was awarded $50,000 by the administrative law judge as compensatory damages for "[t]he mental and physical anguish that Complainant

[30] The relief listed does not include requests related to claims for which I lack jurisdiction or on which Complainant did not prevail.

has suffered . . . as a result of job termination together with the potential damage to his personal and professional reputations," and the Secretary agreed with the award of compensatory damages. Subsequently the parties entered into a Stipulation that related to other specified categories of damages, but the compensatory damages award was not altered.

Upon the evidence in this record, I find no basis for awarding Complainant compensatory damages due to additional injury to his reputation. The only negative recommendations that Complainant proved were to Rankin from Documented Reference Check and to Holtzclaw, both of whom gave the recommendation only to Complainant and were in some way associated with this lawsuit or other whistleblower litigation conducted by Complainant's lawyers. Although these negative references may have constituted an attempt to diminish Claimant's employment potential, there is no evidence to suggest that any prospective employers received it or, indeed, that Complainant was seriously seeking other employment. In fact, Complainant specifically testified that he had not used any of these people as references. Thus, Complainant has failed to demonstrate that he suffered any actual damage or injury to his reputation, apart from that which he already suffered in connection with the prior suit.

As is more fully discussed in the Addendum, I note that the Claimant was found entitled to compensatory damages of $50,000 based upon mental and physical anguish (as well as potential damage to personal and professional reputations) in the previous case and I further find that the situation in the instant case is far more egregious than in the previous case. As such, I find that Complainant is entitled to a significantly greater compensatory award than in the prior case, and I award him $100,000 in compensatory damages for mental and physical anguish and emotional distress.

2. Affirmative Relief

Complainant additionally seeks affirmative relief in the form of a detailed order specifically stating all of the terms of employment that must be undertaken in order to remedy the effects of these adverse actions. In order to deal with the complexity of these issues, Complainant specifically requests that the parties be required to enter a consent agreement as to the means to be taken in order to reach such a remedy. He feels that such an agreement is necessary due to the difficulties that have been encountered as a result of his previous reinstatement.

I agree with Complainant that a detailed agreement (or Order) is necessary. If the parties had been able to successfully integrate Complainant back into the EPA, the present suit would not have been necessary. Accordingly, I order the parties to attempt to reach a mutually agreeable plan to integrate Complainant back into the agency.

In order to fully remedy this situation, the agreement (or Order) must address the following concerns: First, all efforts should be made to find a way to allow Complainant to return to work in the office. Complainant's isolation, while not primarily caused by his working from home (as discussed above), is facilitated by that fact. Thus, Complainant's integration into the EPA should involve his physical reintroduction into the office to the extent possible.[31] Second, the agreement should in some manner ensure that the duties of the Complainant are meaningful. For example, to ensure that Complainant's duties are that of a Senior Science Advisor, the agreement could require that Complainant be placed in an actual Senior Science Advisor position instead of effectively making him an assistant to another Senior Science Advisor. Third, the agreement should contain the details of how other EPA employees will be informed of this decision, including postings, meetings, or any other mutually agreeable method. Fourth, the agreement should include some prohibition against "bad mouthing" or otherwise providing information or opinions relating to Complainant that would be potentially damaging to his personal or professional reputation or privacy interests absent good cause. Finally, the agreement should, at a minimum, contain some procedure for training Complainant's supervisors and other managers as to the prohibition of adverse actions against whistleblowers and for guiding EPA managers in how to deal with situations such as requests for references or for expert testimony.

3. Oversight / Enforcement

Complainant requests that I retain jurisdiction over this complaint and require the filing of monthly reports until such time as it is apparent that the ordered relief has been implemented. However, the Six Acts and the implementing regulations do not provide any authority for an administrative law judge to retain such oversight power. Further, Complainant has provided no authority suggesting that such relief would be available. Moreover, such relief is at bottom a request that I retain enforcement power over the relief to be implemented, and I have found above that such enforcement power lies with the United States District Court. Accordingly, this relief is denied.

4. Punitive or Exemplary Damages

Punitive, or exemplary, damages are specifically available under the SDWA and the TSCA "where appropriate" (15 U.S.C. § 2627(b); 42 U.S.C. 300j-9(i)(B)(ii)); they are not

[31] While Complainant is allergic to the present building, testimony was elicited that the Office of Water may be changing buildings.

mentioned as a form of relief under the other statutes.[32] Punitive damages are available where the actions were intentional and were done with the actual resolve to take action to effect harm. However, even where this intent exists, the decision of whether to award punitive damages is still discretionary. Further, the Board has stated that punitive damages should not be awarded "[i]f the purposes of the statute[s] can be served without resort to punitive measures." ***Johnson v. Old Dominion Security***, 1986-CAA-3, 4 and 5 (Sec'y May 29, 1991) (Slip op. at 24-25 n.20.)

At the outset, I note that a waiver of sovereign immunity must be clear and unequivocal. ***Pogue v. U.S. Department of the Navy,*** 1987-ERA-91 (Sec'y May 10, 1990). I am not convinced that there has been such a waiver here. However, resolution of this issue is unnecessary as I find no basis to award such damages in the instant case.

Even assuming, ***arguendo***, that such damages may be awarded against a Federal agency, I find that the Complainant has failed to prove the requisite intent and I do not find that the purposes of the Six Acts will not be served without the imposition of punitive damages. ***See Jenkins v. United States Environmental Protection Agency,*** 92-CAA-6 (Sec'y, May 18, 1994) (rejecting recommendation by administrative law judge for the imposition of $10,000 in punitive damages where the employer EPA had effectively isolated the complainant as a result of her protected activities and was found to have routinely punished whistleblowers through such assignments). Accordingly, I find that Complainant is not entitled to an award of punitive damages.

5. Attorney's Fees and Costs

As Complainant has prevailed on significant issues in this case, he is entitled to an award of costs and expenses, including a reasonable attorney fee. ***See*** 42 U.S.C. § 7622(b)(2)(B) (CAA); 42 U.S.C. § 9610(c) (CERCLA); 42 U.S.C. § 300j-9(i)(2)(B)(ii) (SDWA); 33 U.S.C. § 1367(c) (WPCA); 42 U.S.C. § 6971(c) (SWDA); 42 U.S.C. § 2622(b)(2)(B) (TSCA); 29 C.F.R. 24.8(d)(2).[33] ***See also Hoffman v. Bossert,*** 1994-CAA-4 (Admin. Review Board Jan. 27, 1996). Accordingly, counsel for Complainant is ordered to submit a fee petition documenting the hours worked and the rates claimed within thirty (30) days of the final approval of this decision and order. The EPA must then file its

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[32] As noted above, the Secretary found in the previous suit that the EPA is covered by the SDWA.

[33] As amended, the regulations at section 24.8(d)(2) of 29 C.F.R. appear to suggest that attorney fees and costs may only be awarded by the Administrative Review Board and then only if the matter has been appealed to the Board. However, the regulations cannot be read in that way as they would be inconsistent with the statutes cited above (the Six Acts).

objections to this petition, if any, within thirty (30) days of the submission of the fee petition.

CONCLUSION

Upon consideration of the entire record, I find that Complainant has provided sufficient evidence to show that the EPA committed adverse actions in "bad mouthing" him (with respect to job references and his potential as an expert witness), in engaging in conduct that was tantamount to isolating Complainant from his fellow employees and peers (particularly with respect to travel and phone messages), and in drafting the Cannon response letter to Congress regarding Complainant's Waco testimony. The EPA did not present any evidence of nondiscriminatory reasons for the "bad mouthing" and I find that Complainant satisfied his burden of proof and persuasion with respect to this adverse action. Although the EPA did present evidence that other, nondiscriminatory reasons existed that could account for the isolation, this evidence was not sufficient to prove that the adverse action would have been taken absent Complainant's protected activity and I found these reasons to be pretexts. With respect to the Cannon letter, the EPA was able to present proper, nondiscriminatory reasons for the response, and the Complainant was unable to prove by a preponderance of the evidence that these reasons were mere pretexts for discrimination. Accordingly, Complainant has proven his case in respect to the attempts to "bad mouth" him and his effective isolation. Complainant is thus entitled to relief under the Six Acts, as set forth above.

ORDER

IT IS HEREBY ORDERED that Complainant's claim be, and hereby is, **GRANTED** to the extent set forth above, and:

1. The Respondent Environmental Protection Agency shall pay to Complainant, Dr. William Marcus, the sum of $100,000.00 in compensatory damages for mental and physical anguish and emotional distress;

2. Complainant's attorneys shall submit an attorney fee petition and bill of costs within thirty (30) days of the date of this decision and order, and Respondent shall file any objections within thirty (30) days of service of the fee petition and bill of costs; and

3. The parties shall enter into a consent agreement providing for affirmative relief within sixty (60) days of the date of issuance of this decision and order, consistent with the above discussion, ***provided***, that if the parties are unable

to reach an agreement, each party shall submit a proposed Order addressing the same matters.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE: In accordance with Departmental regulations, as amended January 30, 1998, this Recommended Decision and Order will become the final order of the Secretary unless a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Copies of the petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. To be timely filed, a petition for review must be filed **within ten (10) business days** of the date of this Recommended Decision and Order. ***See*** 29 C.F.R. §§ 24.7, 24.8; 63 Fed. Reg. 6614 (February 9, 1998).